JUN 6 1955
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IN THE

Supreme Court of the United States

No. 127

ROY SICKLES,
Plaintiff-Petitioner,

vs.

GRAYBAR ELECTRIC COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for Seventh Circuit.

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May it Please the Court:

The only opinion below is—

Sickles v. *Graybar Electric Co.*, (7 Cir. 1955), 219 F. 2d 847 (opinion by Hon. J. Earl Major).

It is printed in the Appendix hereof, page .....

Grounds on Which This Court's Jurisdiction Is Invoked.

The Court of Appeals, on February 18, 1955, entered judgment reversing plaintiff-petitioner's $40,000 judgment for personal injury, based on a jury verdict in the District Court (N. D. Ind.).

His timely petition for rehearing was denied on the merits on March 8, 1955.

This Petition is filed 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. 1254 and 2101.

Questions Presented for Review.

Plaintiff-petitioser claims:

(1)

The Court of Appeal's decision reversing his $40,000 personal injury verdict and judgment for alleged insufficient evidence is based on an alleged failure of proof *on a single fact issue,*—whether the negligent act was *committed by* one of defendant's employees. It is a plain and serious *violation of his right to jury trial,* taking the facts as stated *on the face of the opinion.* (Appendix hereof, page 120).

(2)

No. (1) is aggravated by the further fact, shown in the record, that the opinion seriously mis-states, or omits, important facts, directly proven, which clearly uphold the verdict on the point in question.

(3)

The Court of Appeals committed a reviewable abuse of discretion by needlessly denying plaintiff-petitioner's sole counsel of an adequate opportunity to brief and argue in favor of the verdict in that Court. This consisted of denying a *joint* stipulation of the parties, which stated the obligatory absence of plaintiff's counsel on a case then in progress in the United States District Court for the District of Puerto Rico, and which stipulated for and *jointly* prayed an extension of time for appellee's brief, the reply brief and oral argument. (Appendix, page 103). The Court's denial forced plaintiff's counsel to return the

day before the argument and attempt the impossible task of writing the entire appellee's brief and preparing for oral argument in the final 24 hours preceding argument. (Appendix, page 125).

No cause existed or is shown by the record for inflicting this hardship. This fostered the Court's erroneous appraisal of the evidence and verdict by denying plaintiff an adequate opportunity to present and defend them. (Appendix, page 125). This abuse of discretion is presented here, both—

(a) As accentuating errors Nos. (1) and (2), *supra*, and—

(b) as independent ground for review under this Court's "general power to supervise the administration of justice in the federal courts" under the doctrine in *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U.S. 247, 260.

Mere review of factual error, as such, is not our basic object here, but (1) to prevent a serious miscarriage of justice against the plaintiff-petitioner, and (2) to prevent this plainly erroneous precedent and appellate practice from going uncorrected in a Court of Appeals.

Factually, the opinion resolved the question for review here under (1) and (2) *supra* into a "who-done-it" case, since *the reversal was actually predicated solely* upon alleged failure of proof that the negligent act was *done by* one of defendant's employees. *Hence, the facts to be reviewed here are simple*, it being sufficient to show evidence from which the jury could infer that fact, contrary to the impression of great factual involvement conveyed by the long, argumentative and in part completely inaccurate factual recital in the 13-page opinion.

The unusual character of the asserted abuse of discretion under (3) *supra,* has seemed to make it necessary to enlarge the Appendix hereof by a few pages setting out the chronology, stipulation, petitions and orders relating to the preparation and filing of our appellee's brief below, so this Court may conveniently see these factual documents rather than our recital thereof. (Appendix, pages 101-107 and 124-128).

Constitutional Provision Involved.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Constitution, Amend. 7.

STATEMENT OF THE CASE.

Summary of Proceedings.

This common law personal injury action was filed in the Indiana state court in the county where plaintiff-petitioner resides and was injured. Defendant, a New York corporation, removed the case solely on ground of diversity. (R. 3).

Plaintiff recovered a $40,000 jury verdict (R. 371). The District Court denied motions for directed verdict (R. 197, 351), denied defendant's motion to set aside the verdict and render judgment for it, or for new trial (R. 371) and entered judgment on the verdict. (R. 374).

Defendant appealed, and the Court of Appeals reversed the judgment with directions "that it be vacated." (Appendix page 124).

Issues in the District Court.

The complaint alleged that on the date of injury, January 24, 1949 (Monday) plaintiff was working as an independent contractor, doing work on the ceiling of defendant's premises, and that:

> "3. Said fall occurred *under the following circumstances* and in the following manner: Plaintiff and his employees in the course of doing said construction job had erected a scaffold about seven feet above the concrete floor for the purpose of enabling them to work on the ceiling. Said scaffold consisted of trestles with wooden legs abut seven feet high standing on the floor, which in turn supported planks which formed a platform about seven feet above the floor for plaintiff and his employees to stand on in doing their work. On the *morning* of said date said trestles and their

said wooden legs supporting the platform were *placed in a secure and safe position* to support the plank platform for the plaintiff and his employees to stand on in doing said work. However, said structure was placed and set up in such a manner, as above described, so that it *would become unstable and likely to collapse* under the plaintiff and his men if part thereof were *tampered with*, and particularly *if one of the trestles were moved out of said position* so as to *diminish the lateral support thereof*. Under said *circumstances*, on the *forenoon* of said date, after plaintiff began work that day, *one or more* of the defendant's employees then and there acting in the course of their employment and the scope of their agency for defendant, *whose names are presently unknown to plaintiff* but are known to defendant, *moved* one of said trestles out of its said position *so that in its new position it lacked lateral support* and thereby made the platform unstable and likely to shift and collapse under the plaintiff or any person would thereafter stand upon the platform. They did this *without plaintiff's knowledge* and without *informing* him thereof. Thereafter, on the forenoon of said date, the plaintiff went up on said platform to resume his said work, whereupon said platform collapsed and caused the plaintiff to fall approximately seven feet to the concrete floor, thereby inflicting upon him the injuries hereinafter described.

4. The aforesaid acts and omissions of defendant's employee or employees was *negligent*,—that is to say, they were such that an *ordinary prudent person* under like circumstances would not have been guilty of such acts and omissions, in each of the following particulars:

(a) Said employee or employees tampered with and changed the support of said platform *by moving* one of said trestles out of the aforesaid position where plaintiff had placed it, to said position *where it lacked lateral support* and so that the platform was likely to collapse under the plaintiff, as above described in paragraph 3.

(b) Said employee or employees of the defendant then and there knew, or in the exercise of ordinary care *should* have known, that there said movement of said support *would cause* said platform to be unstable and likely injure the plaintiff or any person thereafter going upon the platform, but nevertheless, said employee or employees then and there and thereafter *failed to inform or warn plaintiff* of the fact that they had thus tampered with and moved said support." (Our emphasis). Printed Transcript, 6, 7.

Defendant filed answer in the District Court denying the above essential allegations of the complaint, and pleading the affirmative defense of *contributory negligence*. (R. 11-12).

The jury's general verdict and the District Court's repeated denials of defendant's motions attacking the sufficiency of the evidence and verdict, resolved all those issues in plaintiff's favor. (R. 197, 351, 371).

Contributory negligence was apparently abandoned in the District Court by failure to include it in any of the above motions.

The $40,000 *amount of damages* for plaintiff's severe injury was not attacked in fact or law by defendant's motions in the District Court (R. 197, 351, 371) or on appeal (R. 376).

Issues Presented to the Court of Appeals.

Contributory negligence was certainly abandoned on appeal by failure to include it in defendant's Statement of Points which did include negligence, proximate cause and identity of the actor. (R. 376).

The opinion concedes "that issue (contributory negligence is not raised here." (Appendix, page 117).

Issues as Decided and Narrowed by the Court of Appeals.

Though much of the first ten pages of the opinion reads as if getting ready to decide lack of evidence that a negligent act was committed by anyone against plaintiff (moving the support) or lack of evidence of proximate cause (Appendix, pages 109-119), the opinion finally *holds* these issues *were sufficiently proven* for the jury, saying:

> "• • • The *first essential* step on plaintiff's theory was to show that the scaffold collapsed *because* the west end of the south ledger, together with the supporting legs, *was moved* from a point of safety to one of peril. If plaintiff's burden *ceased* with proof of that link in the chain, *we would agree that a jury question was presented,* even though the physical facts enshroud the cause of the collapse with much doubt." (Our emphasis).
>
> Appendix, page 120.

Though conceding (*supra*) that the support was moved, the opinion had already rejected plaintiff's inference, which the jury and District Court found to be true, that the circumstances sufficed to show "ample opportunity and motive" for the employees to move this scaffold support in doing their *admitted work* in the vicinity in the hour preceding the accident. (Appendix, page 119). This rejection was on the totally false legal premise that plaintiff relied on *res ipsa laquitur*. Then the opinion proceeds to decide the case on its *own* fact inference that although *somebody* moved it, it wasn't done by defendant's employees because it would take a "superman" to do it. The opinion says:

> "• • • However, *accepting* the premise as to the *cause* of the collapse as urged by plaintiff *and as the jury evidently found,* the next and *vital* question is

whether the support was moved by one of defendant's employees.

We think there is *no reasonable basis* upon which *this* issue *can* be resolved in plaintiff's favor, either by *inference* or otherwise. No employee of the defendant was *seen* at or near this southwest *corner* of the scaffold at *any time,* and particularly on Monday morning. It is argued (as above shown) that defendant's employees had the 'opportunity and motive' either by shoving it with a hand truck or thoughtlessly shoving it to one side. It *taxes all credulity* to believe that this horse could have been moved *by one person* thoughtlessly, accidentally or *inadvertently.* Its movement *would* have required a *superman and one acting deliberately.* The record does not disclose the weight which rested upon the ledger and saw horse but it is evident that *half* the weight of the scaffold at the *south end* rested upon it. We have heretofore given the *dimensions* of the various parts which entered the construction of the scaffold and of the parts which constituted the platform. This at the *time* of the *collapse* carried the *weight* of two men, their tools and the material being used. It was necessary that the ledger and supporting legs be moved for a distance of more than 12 to 14 inches before the ledger would be without support. No explanation is made and we doubt if any could be as to how one man *or two* men *could* move this construction by carelessness, inadvertence or accident. But plaintiff argues that defendant's employees had 'ample opportunity and motive' to move the supporting legs. Even so, it is *not inferable* therefrom that *any* employee *performed the act asserted.* They had no different or better opportunity than plaintiff and his employees and, being *aware* of the danger, it cannot *sensibly* be *inferred* that they *deliberately* committed an act which endangered their own safety as much as that of plaintiff and his men." (Our emphasis).

Appendix, pages 120-121.

Careful reading of the above part of the opinion will demonstrate that *it is the sole actual basis for reversal.* The preceding eleven pages had argued several different theories of failures of proof on other fact issues and then abandoned them as grounds of decision.

Immediately after the above passage, the opinion seems to flirt with the idea of bolstering itself on this fact issue by citing an inapplicable case and saying that plaintiff's inference that the employees did it is contradicted by their testimony that they did not. It says:

> "Moreover, this essential inference ,discernible to plaintiff, is *contradicted* by the positive *testimony* of each of *defendant's employees* who were at the premises on Monday morning. * * *
>
> "If it be thought, however, that the jury had a right to *discredit* the testimony of defendant's *employees* on this point, there remains a *failure of proof* that the scaffold *was moved or tampered with by one of them.* See *Moore, Administratrix* v. *Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 577."
>
> Appendix, page 121.

The above abrupt abandonment of the "positive testimony" (by defendant's employees) theory, and reverting to the "failure of proof" (by plaintiff) theory, was probably caused by the fact that the *Moore* case which it cites holds that "it is the *jury's* function to credit or discredit *all* or *any part* of the testimony" of defendant's employee. (340 U.S. 573, 576).

Any doubt that the decision was squarely and entirely predicated on the above theory of "failure of proof" that defendant's employees are not the ones who did the act of moving the support, is removed by the opinion's closing paragraph:

> "Obviously, there can be no inference of negligence *without proof* of the *act* alleged to give rise thereto.

And, as all must admit, there *is no direct proof* and *we* think *no circumstantial evidence* by which it *could* reasonably be *inferred* that the scaffold support was *moved* into a place of danger *by defendant's employees.* A finding in favor of the plaintiff on *this* essential element of his case can rest upon *nothing* more than conjecture, speculation and guess.

"The judgment appealed from is reversed and the cause remanded, with directions that it be vacated." (Our emphasis).

Appendix, page 123.

Limited Scope of Fact Issues Before This Court.

If we correctly understand the practice in such cases, this Court, in passing on this petition or on the merits, will confine its review of the facts to the above factual question which the Court of Appeals decided *against* the plaintiff-petitioner as the *basis* for reversal (alleged failure of proof that it was one of defendant's employees who did the act of moving the support), but will not review the remaining fact questions raised by the defendant and decided *in favor of plaintiff* by the Court of Appeals (that the act of moving the support was done by *someone negligently* and was the *proximate cause* of the injury. (Appendix, page 120). In other words, we understand this Court will not review fact issues decided against the appealing defendant by the Court of Appeals, in order to decide one of those issues in defendant's favor and thereby sustain the result of reversal on different grounds.

Law Issues Before This Court, Important but Simple.

In thus placing the reversal on the narrow, untenable, and plainly absurd fact question quoted at page 9, *supra,* the opinion did not diminish but accentuated the need for

correction of the serious legal errors of (1) violating plaintiff's right to jury trial, which is already apparent on the face of the opinion, (2) plus omitting or erroneously stating important proven facts on the point decided, which, if stated, would destroy the alleged factual basis for the decision, and (3) abuse of discretion by needlessly inflicting hardship on plaintiff's counsel and making it impossible for him to adequately defend the verdict. (See Questions, page 2, *supra*).

Moreover, placing this violation of the right to jury trial on such an untenable legal basis, as appears on the face of the opinion, renders application of the proper law principles simple.

SUMMARY OF EVIDENCE.

Scope of the Evidence to be Reviewed Here.

The aforesaid narrowing of the fact issue as the case comes to this Court, also operates to narrow the area of the evidence which needs to be reviewed here,—narrows it to the direct and circumstantial evidence from which the jury could reasonably infer the fact that the *act* of moving the support was *done by* one or more of defendant's employees.

The District Court correctly instructed the jury that under the complaint this issue was—

> "whether *one or more* of Graybar's (defendant's) *employees* did the acts charged in the complaint while working in the course of his or their employment," and if so, "it is not incumbent on you to establish in your minds the name or *identity* of the *particular* employee who did the act or acts of negligence * * *" (R. 359).

And also gave the jury the standard instruction that—

> "A case may be made out by circumstantial evidence as well as by direct evidence. * * *" (R. 360).

General Nature of the Proof.

Plaintiff and his helpers were busy with their own work and did not see the act of moving the support. *The only other persons* in or around this room were defendant's foreman and employees, who professed complete ignorance of the act of moving. Hence, plaintiff was obliged to use circumstantial evidence to prove a group of several essential elements in his case,—that the support *was moved* by somebody, *negligently,* which proximately *caused* the collapse, and the *identity* of the actor as an *employee* of defendant.

On the above fact issues, a large amount of testimony was put in by plaintiff and his seven witnesses (R. 14-164), and by defendant's fourteen witnesses (R. 200-289). With minor exceptions, all these witnesses consisted of plaintiff and his helpers, and defendant's supervisors and employees.

Photographs of the scene of the injury were introduced by both sides, and plaintiff introduced a sample leg from the original scaffold in question, similar to the leg that collapsed. (R. 28-30, 34, 49-51).

By this direct evidence, a large number of *supporting* facts or *circumstances* were proven by both sides,—some from which to *infer* the above group of ultimate facts in plaintiff's case; others from which the defendant sought to *repel* plaintiff's inferences, or sought to *infer* ultimate facts of its case, such as alleged contributory negligence of the plaintiff in connection with the erection or operation of his scaffold.

The Court of Appeals' opinion held that all the aforesaid group of plaintiff's ultimate facts (movement of the support, negligently done, and proximate cause) were sufficiently proven for the jury by these circumstances, but that the *identity* of the *mover* as being one or more of defendant's employees *could not* be *inferred* from these circumstances or from any evidence in the case.

It is only for reviewing the last mentioned error that the evidence will be summarized, but most of the chain of circumstances bear on this last ultimate fact and will be briefly covered.

The chain of circumstantial events started the Saturday morning preceding the accident and continued on Monday morning until the collapse at 9 A.M.

Place and Nature of Work.

Plaintiff's contract job was to construct a ceiling in this "stock room" or "shipping room", which was an interior room in defendant's warehouse. The room extended about 40 feet north and south and about 14 feet east and west. Plaintiff started building the ceiling at the south end of the room Saturday morning, and worked north, worked all day Saturday, and resumed work Monday morning shortly after 8 A.M. He had three helpers Saturday and two Monday, besides himself.

Construction and Weight of the Scaffold Show This Leg Was Readily Moveable by One Man and Dispel the Opinion's "Superman" Argument.

The uncontradicted testimony of plaintiff and his three helpers, all expert carpenters and familiar with such mat-

ters, plainly shows that this scaffold was of *relatively light weight* and *so constructed* that *one* man (even of the Mr. Peepers type) *could easily perform the simple movement* of merely *sliding* or *pushing* this west leg of the south horse northward along the smooth floor a distance of a couple of feet from its place of security to the place of insecurity where it collapsed. These physical facts sustain the inference drawn by plaintiff and the jury that one or more of defendant's employees had the ability to perform this movement easily in carrying out their duties that Monday morning, as discussed, *infra.*

The astonishing and totally unsupported assertions and inferences in the opinion that it would take one "superman" and at least two ordinary men to move that end of the horse (Appendix p. 120-121), form most of the supposed factual basis for the Court's decision that it was *impossible* for the jury reasonably to *infer* that defendant's employees moved it, as above quoted at page 9.

The scaffold simply consisted of three large horses each 7 feet high, similar to an old fashioned backyard sawhorse except larger. Each horse had an "A" shaped end piece or "leg" at each end, consisting of two 2" x 4" timbers going up to a point at the top. These 2 x 4's were fastened together at the top by a metal clamp with bolts and nails. The 2 x 4's were fastened together lower down, by having boards nailed across them the flat way, so they could not spread.

These "A" shaped "legs" stood upright, one at each end of the horse. Their two apexes were joined by a 2 x 6 timber which was fastened edgewise in the metal fitting at the apex or top of each leg. This 2 x 6 timber can be made as long as a carpenter wants the horse to be. The

long edge of the 2 x 6 extended a little above the apexes of the two legs which held it, so as to form a smooth narrow edge on which to lay the platform planks.

The horse is sometimes referred to in the pleadings and evidence as a "trestle," and the 2 x 6 at the top is generally called a "ledger." The ends of the 2 x 6 stuck out a few inches beyond the legs at each end of the horse. This 2 x 6 was cut almost as long as the width of this room, so that the ends of the 2 x 6 would butt up against or close to the solid east wall of the room, and the west end of this timber would butt up against or close to the tall steel storage bins which took the place of the west wall of the room. There was a half inch or so of play between each end of the 2 x 6 and the abutting wall or steel case, *so as to permit sliding one or both ends of the horse along the floor.*

There were three of these horses with their 2 x 6 ledgers crosswise of the room, extending nearly wall to wall. The horses stood parallel with each other, about seven feet apart, crosswise of the room. A dozen or eighteen planks were laid lengthwise of the room north and south on top of these horses at right angles to the 2 x 6's which were east and west. The ends of the planks extended about a foot north or south beyond the north and south horses. These planks formed a 7 foot high platform on which plaintiff and his men could stand and reach up and construct the ceiling.

These horses and planks were of strong light fir. Plaintiff personally selected the timber and helped to make these horses that Saturday forenoon using new, first class fir 2 x 4's for the legs and same quality fir 2 x 6's for the ledger. The planks were likewise select fir, mostly 8" or 10" wide and 16' long. They were *not laid tight together* edgewise but had spaces of several inches between them

so as to form a place to stand but also enable the carpenters to look to the floor below. *The planks were not nailed* but simply laid loose on top of the three horses.

R. 18-19, 67-69, 74-81, 90-91, 100, 115-117, 179.

While there is no testimony as to the exact weight of this fir wood material in pounds, it was plainly the lightest, strongest wood available for such use (R. 80, 195). The only part of this scaffold which was moved, causing the collapse, was the west end of the south horse. This moved end supported the extreme southwest corner of the scaffold. Since there were three horses, each with two of these A shaped ends, this made six of the A legs. So each leg supported approximately one-sixth of the total weight of the 12 or 18 planks of the platform. This made the weight of each leg on the floor the equivalent of two or three of the planks, plus half the weight of one 2 x 6, plus the leg's own weight. At the time of the collapse, plaintiff and his helper were standing near the east end of this horse so that only a small fraction of their weight was supported by the west end. (The west end was probably moved while they were off the scaffold, anyhow).

Coupled with this comparatively light weight with which this west end of this horse rested on the floor, is the other important fact already mentioned, that the *platform planks were not nailed or fastened on top of these horses* but were simply *laid loose across* the three horses. This formed an adequate but easy to disassemble platform and *made it possible for a man* to take *one end* of a horse and *slide it along the floor underneath the platform planks.*

R. 100, top, 179.

This is not to be confused by the fact that on that Saturday afternoon, when plaintiff and his helpers finished at

the south end of the room, three of them worked to disassemble and move it and set it up again farther north toward the center of the room. Nothing in the evidence indicates three men were *required* because of its great weight. They simply did the moving job together to save time and get to work again.

Testimony of plaintiff's helper, Buse, was undisputed that after the scaffold had collapsed that Monday morning, and plaintiff had been taken to the hospital, Buse, an old and rather fragile carpenter, was able to re-assemble this collapsed scaffold *single-handed* (R. 135).

The above facts as to the light weight and easily moveable structure of this scaffold were further testified by plaintiff and his other two helpers without contradiction by any defense evidence.

Hence, the imaginary physical fact of the great weight and immobility of the west end of this horse *requiring a "superman"* to move it, which forms the main factual basis of the opinion on the point decided, is not only unsupported but *contrary to all the evidence.* It is absurd and unexplainable in the light of the opinion's statement that the Court had made "a careful review of the evidence." (Appendix, pp. 109, 120).

The above mentioned helper, Buse, also testified that he used all the same legs and wood parts in re-assembling the scaffold, none being broken (R. 135). Buse also testified positively and without contradiction that the "A" shaped legs, formed by a pair of 2 x 4's with a cross piece nailed to them near the bottom did not spread but *were intact after the collapse* (R. 143). There is much other

positive evidence of the structural soundness of the scaffold at all times, except the temporary moving of the west leg away from lateral suport which caused the collase. All this, particularly the above intactness of the legs is ignored and contradicted in that part of the opinion which argues the Court's theory of proximate cause (later abandoned). (Appendix, page 118).

The fact that at the beginning of the work on Saturday morning, plaintiff's foreman, Bassine, required plaintiff to desist from building these horses with cross braces extending corner-wise from the lower part of the legs to the mid-part of the top 2 x 6 ledger which would have made them rigid so they needed no lateral support, and that plaintiff acceded and adopted an *alternative* method of obtaining the lateral support and stability by butting each end of the 2 x 6 up to within ½ inch of the east tile wall and the west steel bin, was not the basis of any *liability* against defendant either in the pleadings or trial. It was pleaded and proven for the purpose of showing a duty on defendant's employees *not to tamper* with this lateral support by moving the leg away from its end abutment.

Activities of Defendant's Employees in This Shipping Room Near Scaffold Were of Character Likely to Cause Them to Move the Support.

A number of related facts, proven by both plaintiff's and defendant's witnesses and undisputed except the minor details, show that preceding and at the time of the collapse, *the defendant's employees were engaged in tasks* in this room of a *character* giving them ample reason either (1) to move this west end of the leg *inadvertently* by pushing a hand truck against the leg, or (2) to move the leg *knowingly* with good intent to gain *temporary* access

to one of the storage bins which it obstructed and then *forget* to slide it back where it had been. This latter trait, *absent-mindedness,* is one of the most common and most accident-producing human failing, as the Court can judicially notice. It is particularly apt to occur when people are working under pressure, as some of these employees, who were in the room just prior to the collapse, testified they were.

This Shipping Room Was the Cross-Road of Defendant's Merchandise.

This 14' x 40" room, variously described by defendant's supervisor and employee witnesses as the "*shipping* room," "*stock* room" or "*packing* room," admittedly formed the *nerve center* of this large "Regional" warehouse of defendant.

Defendant, a nation-wide wholesaler of electrical equipment, much being small-sized items, had this large warehouse building with office space in the front of the building, warehouse space at the back of the building, and this shipping room located between, where it acted as the *intake center* for supplies coming in and the *out-going center* for merchandise sold to customers. A total of two to ten large highway trucks delivered or received merchandise at a loading platform just outside the south door of this room each day.

All the in-coming and out-going merchandise was received into this south door of this room, *checked* by defendant's employees and then was placed in the steel *storage bins* which formed the west side of the room or was taken out to the larger warehouse part. Conversely, *all merchandise shipped to customers,* whether obtained from the bins on the west side of the room or elsewhere in the

warehouse, *passed out* through this room for the purpose of packing, checking and doing the paper work for which at least two of defendant's employees had desks along the east side of the room.

R. 225, 239, 284.

Swivel Trucks.

A further important circumstance is the undisputed fact testified by defendant's supervisors and employees, that the *entire movement of this merchandise in and out of this room* to and from the loading platform outside its south door, was handled by heavy hand trucks, whose flat platforms were a few inches above the floor, equipped with *swivel legs* so they could be manipulated and pushed in any direction to get up to these bins on the west side of the room or elsewhere in the room. Defendant's own description of them, as well as plaintiff's, sufficed for the jury to infer, if they chose, that one of these heavy twisting little trucks was shoved against this west leg and pushed it a foot or two to the north to the point of peril.

R. 22-24, 132, 240, 278.

Other circumstances testified by defendant's executive and employee witnesses was that this room, admittedly busy at all times, *was particularly busy on the Saturday and the Monday morning in question.* Though defendant's employees normally would not work Saturdays, they worked a full overtime day that Saturday because, as defendant's foreman, Bassine, testified, "they were behind in their orders and they had to get them out."

R. 21, 242.

"Special Order" Merchandise Located in Bin Where This West Leg of Scaffold Stood.

Another circumstance testified by defendant's manager and other employees was that *the same stack of bins which this A-shaped leg stood in front of and obstructed access to,* was the place *where special* small lots of small merchandise going to customers *on special orders* were placed for short periods between receipt and delivery.

This indicates that employees in the room needed frequent access to these bins which were obstructed by this leg in question.

R. 224-225, 27.

Defendant's manager, Styles, testified that several front office men *frequently* came back and checked material *in these bins*

R. 240-241.

Several of these men from the front office testified as defense witnesses, that they actually had occasion to come into this room for such purposes *during the hour in question Monday* morning before the collapse. Several said this merchandise had to be *expedited.* Another said that at the time of this accident "we were extremely busy * * * we tried to save time on everything."

R. 253, 256, 258-259, 292, 294, 295.

Number of Employees Around This Room Immediately Prior to the Collapse.

In addition to the several in-and-outers from the front office above described, there was foreman Bassine in charge of this shipping room and its activities, who had three warehouse men working under him that Monday.

While the evidence shows that they sometimes went to other parts of the warehouse and were not constantly in the room, this was *their normal place of work,* as Bassine testified, and as shown by the nature of the room above described, plus the fact that foreman Bassine had his own desk located at the east side of the room, plus another desk of an employee who handled the paper work of checking merchandise in and out of the bins.

R. 14, 263, 271.

On Saturday preceding the accident, Bassine with three employees worked all day around and under this scaffold. Both they and plaintiff and his helpers testified that *they were doing the type of work* above described *with these hand trucks* and also were getting merchandise *in and out of the various bins* above described.

Plaintiff and Bassine both testified that the very *reason* for this foreman's insistence that plaintiff could not use even small short internal braces extending from the A-shaped legs inward toward the center of the room, was that it was *necessary* for defendant's employees *to have the entire floor area clear of obstructions* in order to perform their work, which is another fact amply justifying the jury inferring the employees *needed to* and *did* operate these trucks *around these bins* close up to the bottom of the A-shaped leg of this horse. (R. 109-110, 132, 166).

Same Activity As Saturday Continued Monday Morning by Defendant's Employees in This Room.

Another one of the many erroneous statements of alleged facts in the opinion, on which it bases its own inferences in direct conflict with the admitted and proven facts, is its erroneous assertion that there is no evidence

that these employees were engaged in the above described Saturday-type activities during the hour before the accident Monday morning.

It is undisputed that foreman Bassine was there that Monday morning with the three employees he had the Saturday before. (R. 214). Bassine arrived at 8 A.M. and the other men at 8:30. (R. 227). There is no evidence indicating that they suddenly for some unexplained reason abandoned this normal center of their activities. On the contrary, both plaintiff and Bassine testified that *the normal activities of the same type of work as Saturday were carried on* by these defendant's employees in this room during the time in question preceding the collapse, *Monday morning.*

Plaintiff testified that *on Monday morning up until the collapse* about 9 A.M., three or four of defendant's warehousemen were working in this room *with those hand trucks,* making up orders by going back and forth *getting parts from the bins* and putting it on the trucks, *pushing the trucks up and down the room* like the previous Saturday. (R. 40, 346).

Bassine testified that he and his men were on the job Monday morning between 8 and 8:30 and they did "just normal routine" in that room for about three-quarters of an hour until the collapse at about 9 A.M. (R. 271, 279).

Leg of Scaffold Was Moved Monday Morning.

At the time plaintiff and his three helpers quit work late Saturday P.M., the east end of this 2 x 6 timber or "ledger" was butted up to the east tile wall, and the west end of this 2 x 6 was butted up to the edge of a metal shelf of the tall

steel storage bins which form the west side of this "shipping room" or "storage room", except for about ½" of play normally left between each end and the wall. The large flat "A" shaped west leg, with its cross-board, *stood in front of the stack of bins* above described *where defendant kept "special orders"* of merchandise. (R. 27, 224).

This west end of the 2 x 6 hit the steel shelf about 12" to 14" south of the south edge of a 3' wide passageway (no door) which led through the west wall of bins and back west into the warehouse.

It was testified by plaintiff and his three helpers that this formed a stable and safe lateral support, which, however, would become likely to collapse if this west leg were moved a couple feet north so as to leave the west end of the 2 x 6 with no lateral support except the air of the passageway.

The stability of the scaffold at its above location was shown by the fact that the scaffold held up four men, plaintiff and three helpers, during their final hour of work Sautrday, with no sway or trouble. (R. 25-27).

When plaintiff's foreman Bassine let plaintiff into this room Monday morning at 8 A.M., plaintiff entered from a door on the east side of the room and had to walk directly under the sawhorse in question, and he observed the west end of this 2 x 6 *butted up to that stack of metal bins just the same as he left it Saturday afternoon.* Plaintiff's helper, Buse, and his helper son (he had one less helper Monday) arrived the same way about 8:10, walked under the same horse and saw the 2 x 6 butted the same way. Immediately after arrival, plaintiff had tested the scaffold's stability by the common method of shifting his weight,

found it stable as before, and he and his son worked on it a short while until about 8:40 when he and his son got down off the scaffold and went *outside* the south wall of this room about 15-20 minutes to make a light bracket they had to install on the ceiling. (R. 35-36).

Contrary to another erroneous fact statement in the opinion that plaintiff and his son continued this bracket work *inside* this room, where they would have an opportunity to see any movement of the support by defendant's employees (Appendix, page 113), the undisputed testimony of both plaintiff and his son is that they were making the bracket all during that 15-20 minute interval outside the room on the shipping platform where the necessary tools were and there they were not able to see that west leg of the horse because of the intervening south wall of th room (R. 186-187, 37).

The opinion in similar erroneous fashion infers that plaintiff's other helper, Buse, was in the room in a position to see the movement during that interval. Buse testified that though present within the room, he was installing a skylight in the ceiling some distance south of the scaffold. Buse was then working on a high stepladder, engaged in looking up at his work on the ceiling. Defendant's employee-witness, Felsecker corroborated this. (R. 133, 320-321).

The defendant's employees, on the other hand had opportunity to move the west end of that leg by sliding it to the north a couple of feet, during the absence of plaintiff and his son from the scaffold.

Foreman Bassine had been on the job since 8 A.M. but defendant's other employees arrived about 8:30 so they

were just getting their day's work started when plaintiff and his son came down off the scaffold and left the room 15-20 minutes to make thebracket.

Various Circumstantial Facts, and Inferences Therefrom Sufficient To Sustain the Verdict.

Since the only issue is the fact of moving that west leg *by any* of defendant's employees, it is only necessary to observe that the employee could have moved it in *one of several ways.*

(1) By *unknowingly* and negligently pushing one of these hand trucks against the leg;

(2) Or by *consciously* and negligently moving it to gain *temporary* access to those bins which the leg obstructed, intending to replace the leg but *forgetting* to do it through absent-mindedness or other work.

In fact, it is a fair inference that this 15-20 minute absence of men from the scaffold would probably *operate as a strong incentive* or invitation to any employee who might have *need* to get in the stack of bins obstructed by that leg, to "do it now" during that interval, because, in the light of the warning of Saturday of the danger to men *on* the scaffold if he moved the leg, he would realize he would have no other opportunity to move it to get access to a bin or other purpose until the men would vacate the scaffold again.

The above are not speculations but legitimate factual inferences of *motive* for the employee to *move* the leg at *that time,* which a jury would be entitled to draw, based upon the proven circumstantial facts already discussed, that:

(1) This west leg was located right in front of the stack of "special order" bins, which special orders

went into and out of in small lots. (Testified by plaintiff, R. 27, and defendant's manager, R. 224).

(2) These kinds of orders and merchandise were expedited and checked, sometimes by the warehouse men and sometimes by front office men coming back to this room and doing it. (Testified by defendant's manager, R. 224-225, 240-241—and employees, 253, 256, 258-259, 292, 294, 295).

(3) Four of these front office men testified they did come back to this room on similar errands that Monday during the short part of their work day *preceding* the collapse at 9 A.M. (R. 256, 258-259, 293, 295).

(4) The employees were under pressure of work and short of time, as shown by the circumstance of their working Saturday, and by admissions of defendant's foreman and employees. (R. 21, 258-259).

The above circumstances (1) to (4) have been discussed on the basis of showing *motive* for a *conscious* movement, which the employee forgot to replace.

However, those circumstances (1) to (4), of proven pressure on the employees to get the orders out, could also be used by a jury as showing increased *likelihood* of a careless *unconscious* movement of the leg during that busy period.

But while we think all the above inferences *identifying* the mover as one or more of defendant's employees are a sound and sufficient basis to take the case to the jury and to uphold the verdict, as the jury found and the District Court held, we have perhaps discussed them at greater length than necessary, because there is a simple and clearly

proven circumstantial fact which gives rise almost inescapably to the inference that one or more of defendant's employees *was* the mover and *had* to be, namely:

No Opportunity for Any Other Person to Move the Support.

By a process of elimination:

(1) That leg would not move itself in that short interval or any interval. It was seen to be in place at and a little after 8 A.M. by plaintiff and his two helpers when they came to work. Physical action of the scaffold that morning in soldidly supporting plaintiff and one helper until they came down about 8:40 is strong proof that the leg had not been moved up to that time. Plaintiff and his son went on the scaffold again about 9 A.M. and as soon as slight stress was placed on it, within five minutes, the west end of this 2 x 6 timber and the leg holding it went out through that 3′ west opening. The physical position of this 2 x 6 at and after the collapse showed the leg had been moved at least a couple of feet to the north. Defendant does not contend this leg moved itself. It would be against the laws of nature under the proven physical facts, as above shown.

(2) No outsider moved it. There is no testimony or evidence that any outsider was in this room during the short interval of about 20 minutes in which the movement was done. And if in the room, there is no evidence that the outsider did the moving or had any opportunity or reason to do so. Defendant's employee-witness, Fleckenger, testified he recalled *no employees of any other concern being there that morning.* (R. 323).

(3) It has never been claimed by defendant that the plaintiff or his two helpers moved that leg during that short interval or any interval. Defendant's abandonment of the contributory negligence issue in its motions in the District Court and again in the Court of Appeals, above discussed at page 7, is inconsistent with any contention by it that plaintiff or his helpers moved the leg. Besides, plaintiff and his two helpers were physically absent from the leg during this interval. Plaintiff and his son were outside the room and Buse was on top of a stepladder many feet away from the leg. But if present near the leg, the circumstantial evidence would be almost conclusive against their doing the act or having any reason so to do. The leg and other parts of the scaffold did not obstruct their work, and they had no need to get into the obstructed bins.

Further, defendant's employee-witness, Fleckenger, testified he did not at any time that Monday morning see plaintiff or his two helpers around that west end of the horse, "and I don't believe they were." (R. 321).

(4) The above circumstance that *no other person or cause could* have moved the leg, plus the admitted fact that employees of defendant were present, *could* have moved it, and had reason so to do, suffice in themselves to raise at least a very strong fact inference that they did,—notwithstanding their denials of the act, such denials being notoriously unreliable in criminal cases or civil ones like this involving severe liability to the employee and his employer.

While self-sufficient, the above inference becomes greatly strengthened it there is added to it, as should logically

be done, the several other circumstances, above discussed, admitted by defendant's employee-witnesses, showing adequate opportunity and motive for doing the act.

But actually the burden is no longer on the plaintiff to show, or on the reviewing Court to find, this fact issue by strong or preponderent evidence. That burden was on plaintiff before the jury and they found it in his favor. The extent of the burden on plainti in defending the verdict on appeal is well known and is covered, *infra* 45-48.

But if this fact issue, on which the opinion overturns the verdict for alleged total failure of proof, is not merely sufficiently proven to repel reversal, but *strongly proven* in this record, as we believe the above set of facts do,—the effect is to demonstrate the serious character of the errors below and to show clear need for relief and correction here.

III.

Facts on Abuse of Discretion—Denial of Adequate Opportunity to Uphold Verdict by Brief and Argument.

No time emergency exists or has been asserted by either side at any stage in this case. Defendant filed notice of appeal May 18, 1954 (R. 375) and filed its manuscript transcript in the Court of Appeals 39 days later on June 26, 1954.

The Clerk took a liberal amount of time until November 3, 1954 to print and file the printed record, which we do not criticize. (Appendix, 101).

Defendant filed its Appellant's Brief November 24, 1954. (Appendix, 101).

Plaintiff, on December 14, 1954, filed his sworn petition to extend time for his Appellee's Brief from December 14, 1954 to January 17, 1955 stating that his sole counsel had been unable to prepare his brief during the past 20 days,

without fault, due to necessary absence on litigation in the United States District Court for Puerto Rico and litigation in the Indiana state courts. (Appendix, 101-102).

The Court of Appeals, on December 15, 1954, made an order on the above petition extending time for Appellee's Brief to January 6, 1955, cutting down the requested due date of January 17, but not otherwise indicating that further extensions would be refused. (Appendix, 105).

Joint Stipulation for Time to File Briefs.

On January 4, 1955, both parties filed a joint stipulation. It recited that it was impossible for plaintiff's sole counsel to file his Appellee's Brief by January 6, 1955,

> "after due diligence, and because of circumstances *beyond his control,* consisting of *his necessary* absence during part of the time since November 8 on the aforesaid case in the United States District Court for Puerto Rico, and his engagement in trial much of the remainder of the time in Porter Superior Court at Valparaiso (Indiana), *both of* said matters having been set for hearing *prior* to the filing of appellant's brief."

The stipulation further recited that even if appellee's brief were filed on the due date, January 6, appellant's counsel would reasonably need 20 days for reply, beyond the date set for argument, January 18, 1951.

The stipulation further recited that plaintiff's counsel "*is obliged to be absent* in Puerto Rico for an expected *two weeks* during the next month (from January 4) in *necessary* pre-trial discovery work for a trial starting February 21, 1955 and expected to last at least two weeks.

Accordingly the parties stipulated, subject to the Court's approval, that the time for plaintiff-appellee's brief be

extended to February 12, 1955, twenty days for reply brief thereafter, and that oral argument be re-set for any date convenient to the Court after March 13, 1955, and moved for an order in accord with this stipulation.

Counsel of record for both parties signed.

Appendix, 103-104.

Order Refusing Stipulation.

On January 6, 1955 (due date of plaintiff-appellee's brief) the Court entered an order that the stipulation is disapproved, "further extension of time for filing appellee's brief is denied" and the request to re-set the oral argument is denied.

Appendix, 104-105.

Petition for Leave to File Appellee's Brief at Oral Argument.

On January 18, 1955, when called for oral argument, plaintiff-appellee's counsel tendered his printed brief and filed his petition for leave to file it, stating *under oath*:

1. This Court's order of January 6, refusing to extend the time for this brief in accord with the stipulation of the parties, *was wrongly addressed to Indianapolis*, and was re-mailed to appellee's counsel at Hammond on January 8, being delivered to his office by mail *on January* 10.

2. In the meantime, appellee's sole counsel, Jay E. Darlington, not from choice but *under requirement of a prior order* of the United States District Court for Puerto Rico, *had left for Puerto Rico by air on January* 9, and was engaged during the entire week of January 10 in performing necessary and urgent work there in response to that order. *He had left under the requirement of that order*, and was relying upon the assumption that this Court would grant the stipulated extension of time for the brief.

3. Upon receiving this order from his office about January 12, he interrupted his work in Puerto Rico, which remains unfinished, and came back at the earliest opportunity, *arriving* at his office the morning of January 17, *the day before this petition is tendered.*

4. In the course of the next *twenty-four hours* appellee's counsel *prepared* and had this brief *printed,* during the day *and night time of January* 17, and it is now tendered prior to the *oral argument* on the *morning* of January 18, 1955.

5. The plaintiff-appellee recovered a $40,000.00 verdict in the court below which this appeal seeks to invalidate. While he believes the law and facts are clear in his favor, he desires to present the best brief he can *under the circumstances* in support of the verdict, and he believes the court desires to have whatever aid this plaintiff may give. (Our italics.)

* * * * *

Appendix, 105-106.

The above petition was granted filing appellee's brief instanter and the oral argument proceeded. (Appendix, 107).

Petition for Rehearing.

On February 28, 1955 (ten days after the opinion was filed February 18), plaintiff-appellee's counsel filed his petition for rehearing, prepared and mailed from Puerto Rico. It prayed (1) for rehearing and (2) oral argument thereon before the full Court. In addition to specific errors of fact and law in the opinion, it stated as its first ground:

"1. The record in this Court shows that the plaintiff appellee was *needlessly* denied *an adequate opportunity to brief and argue his case.* It shows that a

joint stipulation of both sides to extend the time for his brief and to reset the oral argument, based upon the absence of his sole counsel on a case in the United States District Court for the District of Puerto Rico was denied by this Court on an order shortly preceding the expiration date for his brief and due to an accidental mistake in the Clerk's office the notice of this order did not reach his counsel until after the expiration date for the brief and until the argument was almost at hand. This made it necessary for his counsel to make an *emergency* return trip to his office where he arrived twenty-four hours before the scheduled argument, *with his brief in default,* and with only *twenty-four hours* to *prepare the brief* and *prepare the argument* in this case wherein this Court took thirteen pages to write an opinion on the facts and law. Within that twenty-four hours, *by working with the printer nearly all of the night* preceding the argument, his counsel prepared a short brief, the best that could be done in that time, but *which the opinion* at the bottom of page 6 *characterizes as 'extremely abbreviated'* as to the evidence *without explaining the cause.* With practically no sleep and no adequate opportunity to prepare his oral argument his counsel was obliged to argue this case. The foregoing facts appear from the stipulation, the order denying same, and the petition for leave to file appellee's brief. And the facts stated in this paragraph are further verified in this petition.

"2. Plaintiff appellee respectfully urges that the foregoing *state of facts on the face of this record constitute a miscarriage of justice, an abuse of discretion* by the Court, *and a denial of adequate opportunity* for

him to present the *facts,* which if adequately presented *migh have avoided the factual and legal errors* in the opinion, to wit: (Our Italics).

• • •

(Appended affidavit of counsel verifies par. 1, *supra*). (Appendix 124-127).

On March 8, 1955, an order was entered openly denying the above petition, without opinion. (Appendix, 128)

Basis of District Court's Jurisdiction.

As above stated, diversity is the sole basis of federal jurisdiction. Plaintiff, a citizen of Indiana and injured there, filed his complaint in the Indiana State Court (CR.6) and defendant, a New York corporation, removed it to the District Court for the Northern District of Indiana. (R. 3).

ARGUMENT.

I.

Plaintiff-petitioner's right to jury trial is plainly and seriously violated by the Court of Appeals' decision. This sufficiently appears from the confused, unreasonable and arbitrary treatment of the facts on the face of the opinion.

II.

The above error is aggravated by the further fact, shown in the record, that the opinion seriously mis-states, or omits, important facts, directly proven, which clearly uphold the verdict on the point in question.

Erratic Character of the Opinion.

It seems to us that this opinion, on its face, has many of the ear marks which often characterize a confused and biased opinion.

Throughout, it argues the *Court's* factual inferences against the jury's, often basing its inferences on supposed facts contrary to the record, as shown at pages 14-30, *supra*.

Another peculiar feature is its shifting of issues, arguing and then abandoning them. Much of the opinion's first ten pages argues as if *intending* to hold there was:

(1) Insufficient evidence to show the *occurrence* of the alleged *event*, the *moving* of the supporting leg of the scaffold;

(2) Insufficient evidence to show the alleged event proximately *caused* the collapse and injury.

It makes a legal attack on part of plaintiff's evidence that this support "was moved". (Appendix, page 115-116). Then it argues its own inference that there may have been a *different* proximate *cause*,—that the scaffold may have collapsed from its own structural weakness. (Appendix, page 118). The facts which the opinion gives to support this theory are directly contrary to the direct testimony as shown at pages 18-19, *supra*.

Next, the opinion appears ready to decide against plaintiff by attributing to him a fictitious and untenable legal position in the appeal, saying:

> "It appears that this argument *without so stating* invokes the aid of the doctrine of *res ipsa loquitur*." (Our emphasis). (Appendix, page 119).

Then the opinion proceeds to destroy this legal straw man. Why the Court thought that was the legal basis of plaintiff's case is a mystery, because the record shows that doctrine was never mentioned by plaintiff in the pleadings, trial or brief or oral argument on appeal,—nor by the defendant either. The opinion concedes it was not stated.

Plaintiff's argument referred to in this passage, was a straight argument on circumstantial evidence,—showing that no other person except defendant's employees had the necessary *opportunity* and *motive* to move the leg, then inferring the ultimate fact that an employee did it. This has no relation to *res ipsa loquitur*.

Then the opinion at page 11 abruptly abandons the above two factual grounds and one legal ground, and with apparent reluctance, expressly decides those two fact issues in plaintiff's favor, holding that "a jury question would be presented" on plaintiff's theory—

> "that the scaffold collapsed *because* the west end of the south ledger, together with the supporting legs,

was moved from a point of safety to one of peril." (Page 8, *supra*). (Appendix, page 120, *infra*).

Then the opinion expressly "accepts" the above "premise", "as urged by the plaintiff and as the jury evidently found."

The "who-done-it" Issue.

With the above affirmance of the jury's finding that (1) the alleged wrongful act was committed, and (2) was the proximate cause, and with the jury's award of damages not challenged in the District Court or on appeal, the appeal would normally be over. But the opinion says—

"The next and vital question is whether the support was moved *by* one of defendant's employees." (Page 8-9, *supra*). (Appendix, page 120).

Factual Errors in the Opinion on This Issue.

We believe that this part of the opinion (page 9, *supra*, Appendix, page 121), holding the jury *could not* find this admitted act was *done* by one or more of defendant's employees, is particularly bad in *logic* and in *law*, on the *face of the opinion*, and should be reviewed both—

(1) To remedy this miscarriage of justice to the plaintiff;

(2) To correct this illogical and unjust precedent.

On the face of the opinion, the Court's inference, or argument, which it substitutes for the jury's inference is bad at first blush and becomes worse upon reflection in the following respects:

(1)

It invades the jury's province with its arbitrary and dubious fact dictum that one end of this horse was so heavy

and immobile that "Its movement would have required a *superman* and one acting *deliberately*" to move it the short distance it was moved.

Comparison with the Court's own description of the scaffold earlier in the opinion shows this statement is very dubious as a matter of simple physics and common sense, and this becomes more plain by seeing some additional undisputed facts in the record,—that this entire structure of rather narrow timbers was fir, that the platform planks were not nailed but lay loose on the three horses, that one horse was not bound to another, that nothing except rather light friction prevented the actor from doing this act of sliding the corner end of one horse two or three feet toward the center of the platform, that an old carpenter of small stature (Buse) was able to re-assemble the whole collapsed scaffold single handed the next day.

See record facts at pafes 14-19, *supra.*

(2)

Lack of independent evidence of weight of these simple timbers is referred to in this passage of the opinion. But the law permits both judges and juries to resolve such fact issues which incidentally involve simple problems of weights and mechanics by judicial knowledge which applies equally to fact finding judges and juries: (*Deshotels* v. *Liberty Mutual Life Ins. Co.,* (1953) 116 F.Supp. 55, 63, point 2; *Concrete Appliance Co.* v. *Gomery,* (1925) 269 U.S. 177, 180, 46 S. Ct. 42, 43).

Judicial knowledge is only a substitute for prima facie evidence and is rebuttable by evidence. (*Ohio Bell Tel. Co.* v. *Public Utilities Comm.,* (1937) 301 U.S. 290, 301-302, 57 S. Ct. 724, 729).

Here, both parties chose to let this incidental fact item go to the jury on the above basis without further proof. There is no law or reason which permits a Court of Appeals to substitute its judicial knowledge on a matter of this kind in place of the jury's as to basis for holding the jury could not know the weight or physical movability of this simple layman's structure.

(3)

But taking the Court's rough estimate that the weight or effort was equal to one superman or two ordinary men, would not justify saying the jury could not infer that the defendant's employees moved the leg.

The number who did it was left open as "one or more" in the complaint (R. 7) and instructions (R. 359) and the defendant never objected to this numeral feature. Further, the evidence showed at least three or four able bodied employees generally around that room at the time in question.

(4)

The same paragraph of the opinion which contains the above "weight" fallacy, also contains several other fallacious violations of the jury's basic function of drawing inferences and finding ultimate facts:

The end of this paragraph (page 9, *supra,* Appendix, 120-121) *destroys* the jury's right to use a person's "opportunity and motive" as circumstances from which to *infer* that he *did* a dangerous act if the actor was "aware" of the danger and did it "deliberately". The opinion uses "deliberately" in the sense of "knowingly",—not in the sense of a wilful tort, because the latter are governed by

principles foreign to this admittedly negligence case. It says at the end of this paragraph:

> "being *aware* of the danger, it *cannot* sensibly be *inferred* that they *deliberately* committed an act which endangered their own safety as much as that of plaintiff and his men."
>
> Page 9, *supra;* Appendix, 121.

But it is well known that thousands of motorists and others *knowingly* or "deliberately" do dangerous acts where they are "*aware* of the danger". They do it in many situations and from many "motives",—to save time, to save or make money,—to show off, etc. Yet these, or most of them, are negligence cases, not wilful injuries.

The aggrieved party, either to meet the lack of direct evidence of the act or to supplement direct evidence, constantly asks the fact-trier to infer the act from the fact that the party charged had the "opportunity and motive" to do it.

Seldom or never can the defendant shut out the inference by showing his act knowingly endangered himself as much as his victim.

True, the latter circumstance may also be used by the defendant as a base for contrary inferences favorable to him, such as an inference in favor of self preservation, etc.

But it is a basic function of juries to weigh and choose between conflicting inferences, as much as between conflicting testimony.

This absurd fallacy crops up in several other places and shapes in the opinion. Its effect here is a miscarriage of justice against the plaintiff. Its effect if followed as a precedent will be to emasculate and confuse a large field of circumstantial evidence law.

It would operate to hamstring fact-finding judges as much as juries.

It would shield the "aware" or "deliberate" party who knowingly takes a chance or fails to use due care, but not the absent minded one.

What appears to have happened here, on the face of this opinion, is that the Court's attempt to rationalize its striking down the verdict, leads it also to strike down several common forms of inferences from circumstantial evidence, which have been argued by the plaintiff to sustain this verdict.

Accordingly, this opinion, both as a decision against this plaintiff and as a precedent, works havoc both in the law on juries and the law of evidence.

(5)

Numerous Inferences Suffice to Sustain the Verdict.

The preceding part of this Argument has been mainly devoted to fighting off numerous confused fallacies which the opinion uses to justify its conclusion against the verdict.

On the positive side, there are many inferences which the jury could have used to reach this verdict from the large body of circumstantial facts in the case. It is not necessary or even possible to know which one or ones it used. It suffices for us to point out any one which reasonable men could have applied to the circumstances most favorable to the plaintiff.

Several of these have been set forth with record references to some of their supporting circumstantial facts at pages 27-31, *supra*.

(6)

The "who-done-it" Posture in Which the Opinion Has Cast This Case Accentuates Its Fallacies.

We have already referred to the fact that the opinion expressly upholds the jury's finding that (1) the act of moving the scaffold leg occurred and (2) it was the proximate cause of plaintiff's injury, but holds the jury could not infer the fact that defendant's employees did it. (Most of the fallacies above discussed arise from the opinion's attempt to strike down inferences the jury might draw that the employees did the act).

The opinion's ratification of the jury's finding on those issues favorable to the plaintiff must, we believe, be taken as the ultimate facts of the case, binding on the defendant and the Court of Appeals at least for the purpose of this Court reviewing the logic and lawfulness of the Court of Appeal's ruling on the remaining issue of identity.

So, for review in this Court, we have the Court of Appeals holding:

(1) The act was done by somebody and (2) caused plaintiff's injuries.

(2) It is impossible to infer that the defendant's employees did it, though they had the opportunity and motive.

(3) Therefore, in the Court's view and holding, the act had to be done by some person unknown and not having any known opportunity or motive.

This illogical result comes from refusing to let the jury draw permissible inferences from the body of circumstances of the case, as they were permitted to do on the first two issues.

Legal Principles on Jury's Functions versus the Court's.

These require no elaboration and their application here, we believe, will be apparent:

> "We granted certiorari because of *important problems* as to *petitioner's right to a jury determination* of the issue of causation." (Our emphasis).
>
> *Tennant* v. *Peoria & P. U. Ry Co.* (1943), 321 U.S. 29, 30, 65 S. Ct. 409, 410, 88 L. Ed. 520.

> "The *absence of eye witnesses* was not decisive. • • •
>
> In holding that there was no evidence upon which to base the jury's inference as to causation, *the court below emphasized other inferences* which are suggested by the conflicting evidence. • • •
>
> It is *not the function* of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives *equal* support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the *particular* inference or conclusion *drawn* by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting *inferences* and conclusions that which it considers mose reasonable. *Washington & Georgetown R. Co.* v. *McDale*, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235; *Tiller* v. *Atlantic Coast Line R. Co., supra*, 318 U. S. 68, 63 S. Ct. 451, 143 A.L.R. 967; *Bailey* v. *Central Vermont Ry.*, 319 U. S., 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444. That conclusion, whether it relates to *negligence*, causation or *any other factual matter*, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges*

feel that other results are more reasonable." (Our emphasis).

Tennant v. *Peoria & P. U. Ry. Co.* (1943), 321 C. S. 29, 30, 64 S. Ct. 409, 412, 88 L. Ed. 520.

"It is *no answer* to say the jury's verdict involved *speculation* and conjecture. *Whenever* facts are in dispute or the evidence is such that fair-minded men may draw different inferences, *a measure of speculation* and conjecture is *required* on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only* when there is a *complete absence* of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, *the jury is free to discard or disbelieve* whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being *immaterial* that the *court* might draw a contrary inference or feel that another conclusion is *more reasonable.*" (Our emphasis).

Lavender v. *Kurn* (1946), 327 U. S. 645, 653, 66 S. Ct. 740, 744, 92 L. Ed. 476.

"The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but *whether the jury function* in passing on disputed questions of fact and in *drawing inferences* from proven facts *has been respected.*

(3 Te historic role of the jury in performing that function (citing cases) is being restored in this important class of cases." (Our emphasis).

Wilkerson v. *McCarthy* (1948), 336 U. S. 53, 70-71, 69 S. Ct. 413, 422.

"In reaching its conclusion as to negligence, a jury is frequently calle dupon to consider *many separate strands of circumstances,* and from these circumstances to draw *its* ultimate conclusion on the issue of negli-

gence. Here there are many *arguments* that could have been presented *to the jury* in an effort to persuade it that the railroad's conduct was not negligent, and many counter arguments which might have persuaded the jury that the railroad was negligent. The same thing is true as to whether petitioner was guilty of contributory negligence. Many of such arguments were advanced by the Utah Supreme Court to support *its* finding that the petitioner was negligent and that the railroad was not. *But the arguments made by the State Supreme Court are relevant and appropriate only for consideration by the jury,* the tribunal selected to pass on the issues. For these reasons, the trial court *should have submitted the case to the jury,* and it was error for the Utah Supreme Court to affirm its action i ntaking th ecase from the jury." (Our emphasis).

Wilkerson v. *McCarthy* (1948), 336 U. S. 53, 63, 69 S. Ct. 413, 418.

In *Tennant* v. *Peoria etc. R. Co.* (1943) 321 U. S. 29, 30, ~~a plaintiff having weaker circumstantial evidence than in~~ quoted *supra,* a plaintiff having weaker circumstantial evidence than in the present case, suffered reversal of her judgment in an opinion quite similar in expressed attitude to the present opinion, though far less extreme in its fallacies. It was brought up and reversed.

Tennant v. *Peoria & Pekin Union Ry. Co.* (7. Cir, 1943), 134 F. 2d 860, 866-869.

In the following later case in the same court, one of the opinions was strongly critical of the Supreme Court precedents which it was obliged to follow in affirming a plaintiff's verdict (*Griswald* v. *Garner,* 7 Cir. 1946, 155 F. 2d 333, 334). This court, in a subsequent case which we have quote, *supra,* said:

"There are some who think that recent decisions of this Court which have required the submission of

> *negligence* questions to a jury, make, 'for all practical purposes, a railroad an insurer of its employees'. See individual opinion of Judge Major, *Griswald* v. *Garner*, 7 Cir. 155 F. 2d 333, 334. * * * This assumption that railroads are insurers when the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one inarticulated, that juries will invariably decide negligence cases against railroads. This is contrary to fact, as shown for illustration by other Federal Employers Liability Cases, * * *".
>
> *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 61-62, 69 S. Ct. 413, 417, 93 L. Ed. 497.

Need of Plaintiffs for Relief From Similar Errors in Non-Railroad Cases.

The jury's functions on the issue of defendant's negligence in Federal Employers Liability cases are the same as in negligence cases generally, and those precedents are applicable here, as shown by the first part of the last quotation.

The rights of plaintiffs to jury trials under that Act have been long and strongly protected by this Court, so they are pretty well respected and followed in lower courts.

But how about a man who suffers a non-railroad injury, with similar problems of proof and jury trial?

He is as much entitled to such review and protection.

Probably he needs it more today than the railroad man. It is important not to let him become the "forgotten man" whose basic rights can be violated with impunity in lower courts.

III.

Abuse of Discretion in Refusing Plaintiff-Petitioner's Counsel a Fair Opportunity to Brief and Argue his Case in Defense of This Verdict.

This is Question (3) at page 2, *supra*.

The facts are condensed at pages 31-35, *supra* and set out in full in Appendix, pages 101-107, 124-128.

Although such matters are not ordinarily reviewed, this Court's *power* to do so seems to be clear. It was exercised in the following case:

> "But even if the statute grants only power plus the *discretion* for its exercise, *that does not mark the end of our review* of the en banc phase of this case. • • • In the exercise of our 'general power to supervise the administration of justice in the federal courts, the responsibility lies with this Court to define these requirements, and insure their observance." (Our emphasis).
>
> *Western Pac. R. Corp.* v. *Western Pac. R. Co.* (1952) 345 U.S. 247, 259-260, 73 S. Ct. 656, 662-663, 97 L. Ed.

We believe the facts in this case (pages 31-35, *supra*) show a greater abuse of discretion and much greater hardship to this personal injury plaintiff and his counsel.

What is reasonable time for a lawyer to brief and argue a case necessarily depends to a considerable degree upon:

(1) The demands which other courts are making upon him at the same time.

(2) The nature of the second case where he seeks time.

(3) Any other pertinent circumstances.

The appended record preceding and following the opinion below, show that *plaintiff's counsel was caught between the millstones of two lower federal courts.*

The United States District Court for Puerto Rico, by order dated October 29, 1954 set a large case for trial on February 21, 1955 and thereafter repeatedly refused during December and January to continue the trial. In that case, as here, he was sole plaintiff's counsel. It made a succession of orders, the first on or about November 15 and extending to the end of December 1954, requiring plaintiff's counsel to proceed with extensive and important discovery work in the case for which he had petitioned during the interval of October 29, to November 3, 1954.

Thus the Court in Puerto Rico had cast the die and obtained prior demands on this counsel's time before the printed transcript was filed in the present appeal on November 3 and before Appellant's brief was filed therein November 24, 1954, and the Puerto Rico Court refused to relax its schedule. (The same Puerto Rico case is referred to throughout, *Peckham* v. *Ronrico Corporation*, which involves large sums and had previously gone through two pre-trial appeals, *Peckham* v. *Ronrico Corp.* (1 Cir.) 171 F 2d .... and 211 F 2d .....

This Court of Appeals' demands on plaintiff's counsel to file his brief did not attach until November 24, 1954, after the die was cast and counsel's main obligations fixed in Puerto Rico. The Court of Appeals gave him no relief except the initial extension to January 6, 1955 for his brief. Then the record shows a succession needless hardships imposed on him, one by the mistake of its own Clerk:

(1) Refusing a joint stipulation and motion for time by both parties on January 6, 1955, which was the expiration date for appellees brief, putting him in default instanter without prior warning.

(2) The Clerk's mistake of mis-mailing the latter order to him, to the wrong city so he failed to learn of it until after going to Puerto Rico.

(3) Counsel's emergency return 24 hours before argument, working nearly all night with a printer to turn out a brief necessarily inadequate for this kind of a case with a 380 page transcript, followed by an oral argument without sleep or adequate preparation.

(4) The opinion is full of factual and legal errors as shown in this petition, which might have been prevented to some extent by giving counsel a chance to perform his function to his client and the Court.

(5) The published opinion states that plaintiff's brief "contains an extremely abbreviated statement of the evidence relied upon", without disclosing the reasons therefor.

(6) Plaintiff's petition for rehearing, seeking to correct this deficiency, was denied in 8 days.

(7) This unyielding pressure was *entirely on the Courts own motion* after opposing counsel had joined in a joint stipulation and motion for the needed time.

(8) It remains entirely unexplained. The nature of the case, the amount of time previously had in both courts by everybody, including four months by the Court of Appeal's Clerk, to print the record,—all refute the need for this pressure.

(9) There was no effective way for plaintiff's counsel to extricate himself. He was sole counsel for the plaintiff in both cases. The case in Puerto Rico was so large and complicated as to make it entirely impossible to get substitute counsel. Neither could this be done in the present case at that late stage without sacrificing the plaintiff's interests, because his said attorney solely handled the case and was the only one acquainted with the complex facts in the 380 page record.

(10) It is needless and bad for the public, the courts, the bar and clients, for an attorney to be subjected to such pressure between two lower federal courts. One of them should ease up, and if they don't agree, the one whose claim on him is junior in time, should ease up. No lawyer should be required to ask the Supreme Court's aid to repair damage to his clients rights caused by a situation of this kind.

This Court's power is ample to afford relief either (a) as ancilliary to and accentuating errors (1) and (2) in violating plaintiff's right to jury trial, or (b) as an independent matter for review under this Court's "general power to supervise the administration of justice in the federal courts" (page 49, *supra*).

In this case, the main error against plaintiff in the Court of Appeals was unconstitutional destruction of his verdict by arbitrarily invading the jury's province. Refusal of adequate opportunity for his counsel to defend the verdict is an injury ancillary to the main one (except the hardship imposed on his counsel, which is past and irretrieveable).

Accordingly, plaintiff believes the remedy, if this Court sees fit to give any, should be considered as an incident to the main relief sought, which is first a review on the merits of his right to preserve his verdict. Granting the review would give him the preliminary right denied below,—a fair opportunity to be heard in defense of his verdict.

Wherefore, the plaintiff-petitioner prays that this court may review this cause by certiorari, and for all other ~~past~~ and proper relief.

JAY E. DARLINGTON,
Attorney for Plaintiff-petitioner.

APPENDIX

And on, to-wit, on the third day of November, 1954, there was filed in the office of the Clerk of this Court the printed transcript of record which said printed transcript of record is Certified herewith.

And on, to-wit, on the twenty-fourth day of November, 1954, there was filed in the office of the Clerk of this Court Brief and Argument for Appellant which said brief for Appellant not copied here.

And on, to-wit, on the fourteenth day of December, 1954, there was filed in the office of the Clerk of this Court Appellee's petition for time to file brief which said Appellee's petition for time to file brief is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

APPELLEE'S PETITION FOR TIME TO FILE BRIEF.

The appellee respectfully petitions for an extension of time from December 14, 1954 to and including Monday, January 17, 1955, in which to file his brief and shows:

1. Appellant's brief was filed November 24 and the time for filing appellee's brief expires on or about December 14, 1954.

2. It has been impossible for appellee's sole counsel, Jay E. Darlington, to prepare the brief within that time, after giving preference to its preparation, and without fault on his part, due to the fact that during much of that period he has been absent on litigation in the United States District Court for Puerto Rico and the remainder of the

time he has been in litigation in the Indiana state courts, in cases earlier in point of time than the present one. For the same reason it has not been reasonably possible to prepare and file this petition at an earlier date. The time herein requested is reasonably necessary, in view of the size and importance of the present case, an appeal from a $40,000.00 verdict.

Wherefore, plaintiff-appellee prays that the time for filing his appellee's brief be extended from December 14, 1954 to and including January 17, 1955.

Jay E. Darlington
Attorney for Plaintiff-Appellant

State of Indiana,
County of Lake—ss:

Jay E. Darlington, being first duly sworn, says the above petition is true.

Affiant further says he served a true copy thereof by delivery to the office of appellant's counsel, Mr. Glenn D. Peters, 5246 Hohman Avenue, Hammond, on December 13, 1954.

Jay E. Darlington

Subscribed and sworn to before me this 13th day of December, 1954

Rose Wilder
Notary Public

My commission expires
July 9, 1957
(Seal)

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Order.

(Entered December 15, 1955)

No. 11215

On consideration of Appellee's Petition for Extension of time for filing his brief, it is ordered that the time for filing Appellee's Brief be extended to Jan. 6, 1955.

And on, to-wit, on the fourth day of January, 1955, there was filed in the office of the Clerk of this Court Stipulation for extensions of time for appellee's brief and appellant's reply brief which said Stipulation for extensions of time for appellee's brief and appellant's reply brief is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

Stipulation for extensions of time for Appelele's Brief and Appellant's Reply Brief.

Come now the appellant and appellee by their undersigned counsel of record and, subject to the court's approval, respectfully show to the court their stipulation as follows:

1. The printed transcript having been filed November 8, 1954, and appellant's brief having been filed November 20, 1954, appellee has obtained one extension to and including January 6, 1955. It has been and will be impossible for appellee's sole counsel, Jay E. Darlington, to file said brief within that time, after due diligence, and because of circumstances beyond his control, consisting of his necessary absence during part of the time since November 8 on a case in the United States District Court for Puerto Rico and his engagement in trial much of the remainder of the time in Porter Superior Court at Valparaiso, both of said matters having been set for hearing prior to the filing of appellant's brief.

2. Likewise, even if appellee's brief were filed by January 6, appellant's counsel would reasonably need twenty days thereafter in which to file its reply brief.

3. The case has been set for oral argument January 18, 1955, but due to the aforesaid facts, it is not reason-

ably possible for counsel on either side to complete the briefing within that time.

4. Accordingly, subject to the court's approval, the parties stipulate:

(a) That the time for filing appellee's brief may be extended to and including February 12, 1955 (this length of time being necessary by reason of the fact that appellee's counsel is obliged to be absent in Puerto Rico for an expected two weeks during the next month in necessary pre-trial discovery work for a trial starting February 21);

(b) That the time for filing appellant's reply brief be extended until twenty days after the filing and service of appellee's brief;

(c) That the oral argument of this cause may be re-set at any time convenient to the court subsequent to March 13, 1955 (this being in view of the fact that appellee's sole counsel, Jay E. Darlington, is obliged to commence the trial of the case presently set for February 21, 1955, and expected to last at least two weeks in the United States District Court for Puerto Rico).

5. Accordingly, subject to the approval of the court, the parties respectfully move that an order be entered in accord with the above stipulation.

Glenn D. Peters
Attorney for Defendant-Appellant
Jay E. Darlington
Attorney for Plaintiff-Appellee

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

(Entered January 6, 1955)

Order.

On consideration of the stipulation of counsel for the parties for extension of time for filing appellee's brief and appellant's reply brief,

It Is Ordered that the said stipulation be, and the same is hereby, Disapproved, and further extension of time for filing appellee's brief is denied. The motion of counsel for the parties to re-set this appeal for oral argument is denied.

And on, to-wit, on the eighteenth day of January, 1955, there was filed in the office of the Clerk of this Court Petition for leave to file appellee's brief which said Petition for leave to file appellee's brief is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petition for leave to file Appellee's Brief.

The plaintiff-appellee respectfully tenders herewith the required number of printed copies of his Appellee's Brief and asks leave to file same instanter preceding the oral argument, and shows:

1. This Court's order of January 6, refusing to extend the time for this brief in accord with the stipulation of the parties, was wrongly addressed to Indianapolis, and was re-mailed to appellee's counsel at Hammond on January 8, being delivered to his office by mail on January 10.

2. In the meantime, appellee's sole counsel, Jay E. Darlington, not from choice but under requirement of a prior order of the United States District Court for Puerto Rico, had left for Puerto Rico by air on January 9, and was engaged during the entire week of January 10 in performing necessary and urgent work there in response to that order. He had left under the requirement of that order, and was relying upon the assumption that this Court would grant the stipulated extension of time for the brief.

3. Upon receiving this order from his office about January 12, he interrupted his work in Puerto Rico, which

remains unfinished, and came back at the earliest opportunity, arriving at his office the morning of January 17, the day before this petition is tendered.

4. In the course of the next twenty-four hours appellee's counsel prepared and had this brief printed, during the day and night time of January 17, and it is now tendered prior to the oral argument on the morning of January 18, 1955.

5. The plaintiff-appellee recovered a $40,000.00 verdict in the court below which this appeal seeks to invalidate. While he believes the law and facts are clear in his favor, he desires to present the best brief he can under the circumstances in support of the verdict, and he believes the court desires to have whatever aid this plaintiff may give.

6. Plaintiff-appellee also consents that the appellant may have whatever time it requests and the court grants in which to file a reply brief following the oral argument (an order which under proper circumstances this Court in its discretion can and sometimes does grant).

7. It was impossible for appellee's counsel to prepare and file this brief before leaving for Puerto Rico, for good and sufficient reasons which are detailed in the aforesaid stipulation of the parties, and which reasons are made a part hereof to avoid repetition.

Wherefore, Plaintiff-appellee prays leave to file this tendered brief instanter, and for all further just and proper orders in the premises.

Jay E. Darlington
Attorney for Plaintiff-Appellee

State of Indiana,
County of Lake—ss:

Jay E. Darlington, being first duly sworn, says that the statements in the above petition are true.

Jay E. Darlington

Subscribed and sworn to before me this 18th day of January, 1955

Rose Wilder
Notary Public

My commission expires
July 9, 1957
(Seal)

Received copy of the above petition prior to oral argument, January 18, 1955 at 8:10 A.M.

Glenn D. Peters
Attorney for Defendant-Appellant

And on, to-wit, on the eighteenth day of January, 1955, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

(Entered January 18, 1955)

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and briefs of counsel, and on oral argument by Mr. Glenn D. Peters, counsel for defendant-appellant, and by Mr. E. Darlington, counsel for plaintiff-appellee, and the Court takes this matter under advisement.

On petition of counsel for plaintiff-appellee, it is ordered that leave be, and is hereby granted to file brief for plaintiff-appellee instanter.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
No. 11215
OPINION

Before DUFFY, *Chief Judge*, MAJOR and LINDLEY, *Circuit Judges*.

MAJOR, *Circuit Judge*. This is an appeal from a judgment, entered April 20, 1954, in favor of plaintiff and against defendant, in the amount of $40,000, for damages resulting from personal injuries sustained by plaintiff on Monday, January 24, 1949, because of the collapse of a scaffold on which plaintiff, an independent contractor, was performing services for and in the plant of defendant.

The important ground urged for reversal is that the evidence was insufficient to take the case to the jury on the issue of defendant's negligence, as alleged. This issue was appropriately preserved for review by defendant's motion during trial for a directed verdict and by its subsequent motion for judgment notwithstanding the verdict, both of which were denied by the trial court. After long study and a careful review of the evidence, we have reluctantly come to the conclusion that defendant's contention must prevail. We say reluctantly because we appreciate the fact that the issue has been passed upon by an able trial judge who perhaps was in a better position to evaluate all the circumstances than is this court. Even so, the issue of the insufficiency of the proof is pressed here, on which we are required to pass judgment.

Plaintiff, a carpenter and an independent contractor, was engaged by defendant to install beaverboard on the ceiling and walls of its warehouse in the city of Hammond, Indiana, and commenced such work on Saturday, January 22, 1949. Defendant's warehouse occupied about 10,000 square feet of floor space. The room or part where plaintiff was to perform his work, known as the receiving and shipping room, was about 15 feet in width (east and west) and 40 feet in length (north and south). On the east side

of this room was a solid tile wall, except at about the middle there was a door which led to defendant's office located in the front of the building. In this room and along the wall on the east side were located three or four movable desks, one to the south of the door and others to the north. On the west side of this room was a row of steel shelving, with shelves about one inch thick, which contained storage space for defendant's merchandise. The same kind of storage space was provided on the opposite side of this steel shelving, making it accessible to the adjacent room on the west. This steel shelving occupied all the space on the west side of the room except at a point about the middle there was an open space about three feet in width, which afforded a means of passage from the receiving and shipping room into the adjacent room on the west. There was other steel shelving throughout defendant's warehouse, with which we need not here be concerned. The south end of this shipping and receiving room was open, into which outside trucks carrying defendant's merchandise backed for the purpose of loading and unloading. Merchandise was transported to and from this point to these storage units provided on the west side of the shipping and receiving room and at other points in the warehouse by means of platform trucks or carts about 30 inches wide and 4 feet long, some of which had a swivel wheel, providing a means of turning in short space.

It was necessary for plaintiff to have a scaffold on which he and his men could stand while performing the work for which he had been engaged. On Saturday morning plaintiff brought with him all the material for a scaffold and soon after his arrival construction was commenced. The scaffold consisted of what is referred to as horses, of which there were three in number. A horse had four legs, two at each end. On each horse there was a 2 x 6 timber called a ledger, which ran from the top of one pair of legs to the other, and upon these three ledgers rested the platform upon which plaintiff and his men stood to perform their work. The legs of the horses consisted of 2 x 4 material about 7 feet long, in a V-shape, widening at the bottom

so that the legs at that point were 42 to 48 inches apart. A cross timber ran from leg to leg to prevent spreading. The legs were fastened at the top by a patent metal bracket which had a flange fitting over the side of the legs, three bolts with wing nuts and six nails on each side. The legs did not come together at the top. A space was provided so that a 2 x 6 ledger could be laid on edge between the tops of the two legs of each horse. The ledgers were 13 to 13½ feet long and on each horse extended from one pair of legs to the other and beyond for a distance of 8 to 12 inches. (In other words, the ledgers, three in number, on which the platform rested extended substantially across the width of the room.) When in position each horse was located east and west, with one pair of legs near the tile wall on the east side and the other pair of legs near the steel shelving on the west side. The platform resting on the ledgers consisted of 12 to 18 planks of various widths, such as 2 x 8, 2 x 10, and 2 x 12. These planks were 16 feet in length and extended north and south over the three ledgers which, as noted, ran east and west.

Normally, stability for the scaffold would have been obtained by extending a piece of timber diagonally from the lower part of the V-shaped legs to about the center of the crosspiece (ledger). This, however, would have interfered with access by defendant's employees to the loading and receiving platform at the south end of the room. When defendant's foreman called this situation to plaintiff's attention, he devised an alternative means of providing lateral support which consisted of locating the horses so that the ledger would butt up against the wall at each side, that is, the tile wall on the east and a shelf of the steel cabinets on the west. It should be noted, however, that it was not contemplated that these ledgers should fit solidly against such support as this would interfere with moving the scaffold from one location to another. For this reason a space was left at each end of from one-half to three-fourths of an inch.

Plaintiff discussed with defendant's foreman this alternative method of lateral support for the scaffold and told him of the danger involved if the supporting horses were moved and thereby deprived of the support provided. There was evidence that the foreman and his men discussed among themselves the danger which lurked in the situation.

Plaintiff on Saturday morning commenced work on the ceiling at the south end of the room and the scaffold was located accordingly, with the ledgers supported by the tile wall on the east and by a shelf of the steel cabinet on the west. By 3:30 that afternoon the work over the scaffold was completed and it became necessary to move it farther north in the room, which was done, with the same means for lateral support.

It was shown by plaintiff or some of his witnesses that on Saturday three or four of defendant's employees were working in this room about and beneath the scaffold and that two of them were operating pushcarts carrying defendant's merchandise and, also, that outside trucks were backed into the room at the south end. (We think there is no reason, as will subsequently appear, to detail further facts as to what occurred on Saturday.)

Plaintiff and two of his men returned to work on Monday morning, where they were admitted at about 8 o'clock or shortly thereafter. It is plaintiff's theory, as shown both by his pleading and argument, that the west end of the south ledger and the legs which supported it were moved from a position where the ledger was supported by a shelf of the cabinet to a point where it was without support, and that this lack of support was what caused the scaffold to collapse. There was considerable testimony as to the situation existing at the southeast portion of the scaffold but, in view of plaintiff's position, we think it bears no relevancy and need not be related.

It was shown that after the scaffold was moved on Saturday afternoon, the west end of the ledger was supported

by a steel shelf at a point 12 or 14 inches south of the three foot opening leading in to the west storage room. (This means that the platform of the scaffold extended across the opening and that the north leg of this west pair of legs extended into the opening.) Plaintiff and his men on Monday morning entered from the east (front) door, walked across the shipping and receiving room and through the opening on the west side for the purpose of getting their tools. They reentered through the same opening. They testified that the west end of the ledger and the supporting legs were in the same position as they had been placed on Saturday; more specifically, that the west end of the ledger was abutted against the metal shelf of the steel cabinet at a point 12 or 14 inches south of the opening.

Plaintiff and one of his men (a son) mounted the scaffold by way of a stepladder. Plaintiff tested the scaffolding by shaking it with his feet, that is, by placing his weight first on one foot, then the other, which is the method commonly used in the trade in testing a scaffold before its use. He found it firm, not moving over one-half inch. His first job was to install a ceiling light near the east side of the room (a desk was beneath the platform at this point), and in doing so, he took down an old bracket. A new bracket was required, and plaintiff and his son climbed down from the platform for the purpose of building the new bracket. Plaintiff at this time had been up on the platform about 15 or 20 minutes. At the time he got down from the scaffolding no person was seen in the room other than one of his own employees (Buse) who was on a stepladder located south of the scaffold, engaged in repairing a skylight. The new bracket was constructed in the south portion of the room and, together with the fastening screws, was carried by plaintiff up on the scaffold platform. It was about 15 minutes from the time they left the platform until their return. Plaintiff then started to install the new bracket over the desk with a heavy screwdriver. At this point, plaintiff's testimony is as follows:

"Q. All right, after you went back up on it, what did you do, what happened?

A. Well, I went to screw this bracket into the ceiling with the screw. As I did, why, the scaffold went out to the west, out from under me to the west.

Q. What part went out to the west?

A. Well, the west end of the trestle went out west into this passageway between these bins or these shelves.

Q. Where did the west end of that 2 by 6 ledger go?

A. It went out through the opening, this passageway.

Q. When you say it went out through there, you mean it went to the west?

A. Yes."

As the scaffold started to collapse, plaintiff saw a man with glasses on working at the desk and jumped to avoid him. He landed on the concrete floor and received serious injuries, which need not be described in view of the limited nature of the question for decision. In installing the new bracket at the time of the scaffold collapse, plaintiff was standing at the east end facing east and perhaps it should be noted that his testimony regarding what happened at the west end was based on his observation after he was on the floor and had sustained his injuries.

The court in its charge to the jury outlined the allegations of negligence as contained in the complaint, as follows:

"(1) Said employee or employees tampered with and changed the support of said platform by moving one of said trestles out of the aforesaid position where plaintiff had placed it, to said position where it lacked lateral support and so that the platform was likely to collapse under the plaintiff.

"(2) Said employee or employees of the defendant then and there knew, or in the exercise of ordinary care should have known, that their said movement of said support would cause said platform to be unstable and likely injure the plaintiff or any person thereafter going upon the platform, but nevertheless said em-

ployee or employees then and there and thereafter failed to inform or warn plaintiff of the fact that they had thus tampered with and moved said support."

It seems evident that this second act of negligence is dependent upon proof of the first. At any rate, it is not discernible how there could be negligence on the part of defendant's employees in failing to inform or warn plaintiff that they had tampered with and moved the support unless they had done so.

Plaintiff, in a brief which contains an extremely abbreviated statement of the evidence relied upon, more argumentative than factual, states:

"The collapse occurred by this top beam of the saw horse going west through the above mentioned opening, whereas it had been safely butted against the metal case 12″ or 14″ to the south of the opening an hour earlier.

"Sufficient evidence that this west end of the sawhorse beam was moved over to this opening during that hour Monday morning was provided both by the above mentioned physical fact of it collapsing west through the opening plus the fact which the defendant was obliged to and did stipulate with the plaintiff,—that long before the trial, this foreman, Bassine, signed a written statement in which he admitted that on this Monday morning before the accident happened—

'the east end of the south sawhorse was still butted against the tile wall but the west end of this south sawhorse was not butted against the stock rack (metal case) any longer, as the west end was right in the doorway.'

"With the above physical fact sufficiently proven that this west beam of the sawhorse was moved into that position of peril between 8 and 9 A.M. Monday morning, there was ample ground for the jury to infer that it was done by one of defendant's employees * *."

If the position of peril was created by defendant's employees, it must have been between 8:30 and 9 A.M. be-

cause they, other than its warehouse foreman, did not commence work until 8:30.

Moreover, as shown by this statement, plaintiff relies upon an admission contained in a statement made by defendant's foreman, Bassine. This statement was admitted under the following circumstances: Bassine, a defendant's witness, was interrogated on cross-examination concerning a statement made by him out of court, allegedly contrary to certain answers which he gave as a witness. In rebuttal, plaintiff was about to introduce extracts from the statement asserted to be contradictory when defendant's counsel stipulated that the extracts were contained in the statement made by Bassine. It was expressly offered and admitted as an impeaching statement; obviously, it could not have been admitted for any other purpose. Defendant contends that the record does not disclose whether the impeaching matter relative to the location of the west end of the south horse referred to a time before or after the collapse of the scaffold. We think there is some ambiguity in this respect but, in any event, it cannot be utilized for any purpose other than impeachment. As was stated in *The Ohio & Mississippi Railway Company* v. *Stein,* 133 Ind. 243, 246,

> "Impeaching testimony goes only to the credibility of a witness, and it cannot be given any force as evidence in proof or disproof of a disputed fact, except in so far as it bears upon the credibility of the witness it tends to impeach. [Citing cases.]"

To the same effect see *Allen* v. *Davis,* 99 Ind. 216, 217; *Sanger et al.* v. *Bacon et al.,* 180 Ind. 322, 328, and *Southern Railway Co.* v. *Gray,* 241 U.S. 333, 337.

It therefore appears plain under this firmly established rule that this impeaching statement cannot be considered as proof of defendant's negligence or as proof of any of the circumstances or factors upon which it is sought to infer negligence.

This also appears an appropriate place to comment upon other circumstances upon which plaintiff places much emphasis. Plaintiff in his brief states:

> "The most important factual feature of the situation where the accident happened is that the plaintiff was obliged to do his work on this seven foot high scaffold while the defendant's employees did their regular work underneath the scaffold."

It is not discernible how this so-called important feature has any bearing upon the negligence with which the defendant was charged. Certainly it does not by inference or otherwise show or tend to show that defendant's employees tampered with the scaffold or that defendant failed to transmit to plaintiff any knowledge which it possessed that the scaffold had been tampered with. Also stressed is the fact that plaintiff did not brace the scaffold as he normally would have done because of defendant's request or suggestion that the space beneath the scaffold be kept open. This fact conceivably might have had some bearing upon the question of plaintiff's contributory negligence, an issue in the trial court. That issue, however, is not raised here and we think it is immaterial to the issue of defendant's negligence as laid.

Obviously, both plaintiff and the defendant were aware of the hazard involved in the support method adopted. No inference can arise, however, that defendant's employees committed the acts alleged as constituting negligence because of knowledge of the hazard. If any inference is to be drawn from this circumstance, we think it would point in the opposite direction, that is, with knowledge of the hazard, defendant's employees as reasonable, prudent persons could be expected to exercise more than normal care and caution in their work and activities in and about the scaffold. And it should not be overlooked that any defect in the scaffold which impaired its stability presented a danger to defendant's employees quite as much as it did to plaintiff and his employees. The work of one group

required them to pass beneath the scaffold while that of the other required them to be on top of it.

Testimony as to the number of defendant's employees who were working in and about the scaffold is uncertain. It appears that three or four of such employees were working in the shipping and receiving room on Saturday and that some of them were pushing hand carts, and that perhaps the same number were there on Monday morning. There was no proof, however, that any of such employees were at or near the southwest corner of the scaffold or that any employee passed through the opening nearby. The only persons shown to have passed through this opening on Monday morning were plaintiff and his workmen, who, as heretofore stated, went into an adjacent room to obtain their tools. Much is said relative to the lateral support provided for the scaffold but little as to the longitudinal support. True, it was shown that at the time the scaffold was constructed a crosspiece was fastened near the bottom of each pair of legs to prevent their spread. There was no evidence, however, that this crosspiece was intact after the collapse or, for that matter, at any time after the scaffold was moved on Saturday afternoon. Neither was there any proof as to the condition of the metal bracket which fastened together at the top the two legs of the horse. The only evidence as to the physical situation after the collapse was that, as heretofore shown, the end of the ledger and the top of the two legs were pointed into the opening at the west.

We recognize that plaintiff is entitled to have the evidence considered in the light most favorable to him, and we have attempted to state the facts accordingly. The lengthy statement which we have made, much of it perhaps unnecessary, is due to our inability to cull from the mass of evidence that which is favorable to plaintiff's cause of action as alleged. In any event, we believe we have given a fair resumé of the proof as adduced by plaintiff. For our present purpose we need not be concerned with the testimony of defendant's witnesses except in one respect. De-

fendant produced its payroll record, containing the names of all its employees who were at work on Monday morning, including its warehouse employees. A number of them testified and expressly denied that they touched, tampered or interfered in any manner with the scaffolding or any of its parts. As to all others who were not called, it was stipulated that they would testify likewise if called as witnesses.

Plaintiff by a process of elimination concludes that the west end of the south ledger was moved into a position of peril by defendant's employees. In his brief he states (1) that there is no evidence that it was moved by the plaintiff and his helpers, (2) that it was a physical impossibility that this "large sawhorse" moved itself, and (3) that there is no evidence that it was moved by outsiders. The argument proceeds:

> "And while it is not contended they [defendant's employees] did it wilfully, there was ample opportunity and motive for them to move it, either by giving it a shove with one of their swivel hand trucks which admittedly were working under it, or by an employee thoughtlessly shoving it to one side so he could get into one of those 'bins' which the west legs of the sawhorse admittedly obstructed while in the safe position."

It appears that this argument without so stating invokes the aid of the doctrine of *res ipsa loquitur*. That doctrine was defined in *San Juan Light & Transit Co.* v. *Requena*, 224 U. S. 89, 98, as follows:

> "* * when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

Obviously the doctrine is without application because the thing which caused the injury, that is, the scaffold, was constructed and owned by plaintiff, an independent contractor, and under his exclusive control.

There is no direct proof of any link in the chain by which it is sought to fasten negligence upon defendant. The first essential step on plaintiff's theory was to show that the scaffold collapsed because the west end of the south ledger, together with the supporting legs, was moved from a point of safety to one of peril. If plaintiff's burden ceased with proof of that link in the chain, we would agree that a jury question was presented, even though the physical facts enshroud the cause of the collapse with much doubt. It is just as reasonable, in our judgment, to believe that the collapse was or might have been caused by a spread of the legs which were 40 to 48 inches apart at the bottom, which could have resulted in the ledger and the top of the legs being thrown into the open space. However, accepting the premise as to the cause of the collapse as urged by plaintiff and as the jury evidently found, the next and vital question is whether the support was moved by one of defendant's employees.

We think there is no reasonable basis upon which this issue can be resolved in plaintiff's favor, either by inference or otherwise. No employee of the defendant was seen at or near this southwest corner of the scaffold at any time, and particularly on Monday morning. It is argued (as above shown) that defendant's employees had the "opportunity and motive" either by shoving it with a hand truck or thoughtlessly shoving it to one side. It taxes all credulity to believe that this horse could have been moved by one person thoughtlessly, accidentally or inadvertently. Its movement would have required a superman and one acting deliberately. The record does not disclose the weight which rested upon the ledger and saw horse but it is evident that half the weight of the scaffold at the south end rested upon it. We have heretofore given

the dimensions of the various parts which entered the construction of the scaffold and of the parts which constituted the platform. This at the time of the collapse carried the weight of two men, their tools and the material being used. It was necessary that the ledger and supporting legs be moved for a distance of more than 12 to 14 inches before the ledger would be without support. No explanation is made and we doubt if any could be as to how one man or two men could move this construction by carelessness, inadvertence or accident. But plaintiff argues that defendant's employees had "ample opportunity and motive" to move the supporting legs. Even so, it is not inferable therefrom that any employee performed the act asserted. They had no different or better opportunity than plaintiff and his employees and, being aware of the danger, it cannot sensibly be inferred that they deliberately committed an act which endangered their own safety as much as that of plaintiff and his men.

Moreover, this essential inference, discernible to plaintiff, is contradicted by the positive testimony of each of defendant's employees who were at the premises on Monday morning. Relative to a similar situation, the court in *Pennsylvania Railroad Co.* v. *Chamberlain, Administratrix,* 288 U. S. 333, 340, made the following pertinent statement:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

If it be thought, however, that the jury had a right to discredit the testimony of defendant's employees on this point, there remains a failure of proof that the scaffold was moved or tampered with by one of them. See *Moore,*

Administratrix v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 577.

Plaintiff cites and relies upon a number of cases which hold that a verdict may be sustained on circumstantial evidence. *Carter* v. *John Hennes Trucking Co.*, 210 F. 2d 443, 445-447; *Pohlman* v. *Perry*, 122 Ind. App. 222, 228-230, 103 N. E. 2d 911, 914; *Chicago etc. R. Co.* v. *Pritchard*, 168 Ind. 398, 411-413, 79 N. E. 508; *Kempf* v. *Himsel*, 121 Ind. App. 488, 516. An examination of these cases discloses that they are of little if any aid to plaintiff in the instant action. Generally there was direct proof that the defendant committed or was responsible for an act and it was held that whether the act constituted negligence was a matter to be inferred by the jury from the circumstances. In the *Carter* case, it was a block of wood left in a position by the defendant where it should not have been and which fell, causing injury to the plaintiff. Whether defendant's act constituted negligence was a matter which the jury could infer from the circumstances. The court (page 445) stated that "due care, negligence, and proximate cause may be established by circumstantial evidence." In the *Pohlman* case, plaintiff's wagon and tractor were struck from the rear by defendant's automobile on a public highway. The only inference which the jury was required to make was whether defendant's act was negligent. In the *Kempf* case, plaintiff's decedent was allegedly killed by a car driven by the defendant, which the latter denied. The circumstances, however, showed without doubt that it was the defendant's car and there being no denial of negligence on his part, he was held negligent as a matter of law. In the *Pritchard* case, the cause of the accident was proven by direct evidence to be the defendant's act. The case appears to have turned on the issue as to whether plaintiff's decedent was a trespasser at the time he was killed. The court held that the jury was entitled to infer from the circumstances that he was not.

Plaintiff also cites *Orey* v. *Mutual Life Insurance Company of New York*, 215 Ind. 305, 19 N. E. 2d 547, as au-

thority for the proposition that the sometimes stated rule that an inference cannot be based upon an inference has been repudiated in Indiana. Even so, in view of our analysis of the situation, we think such repudiation is of little consequence here. A more pertinent rule announced by the court in that case is that a trier of the facts is not permitted to draw an inference based upon conjecture, speculation and guess.

Obviously, there can be no inference of negligence without proof of the act alleged to give rise thereto. And, as all must admit, there is no direct proof and we think no circumstantial evidence by which it could reasonably be inferred that the scaffold support was moved into a place of danger by defendant's employees. A finding in favor of the plaintiff on this essential element of his case can rest upon nothing more than conjecture, speculation and guess.

The judgment appealed from is reversed and the cause remanded, with directions that it be vacated.

And on the same day, to-wit, on the eighteenth day of February, 1955, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

Judgment.

(Entered February 18, 1955)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs and that this cause be, and it is hereby, Remanded to the said District Court with directions that the said Judgment be vacated.

And on, to-wit, on the twenty-eighth day of February, 1955, there was filed in the office of the Clerk of this Court Petition for Rehearing before the full Court and for oral argument thereon which said Petition for Rehearing before the full Court and for oral argument thereon is in the words and figures following, to-wit:

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 11215

(Filed February 28, 1955)

Petition for Rehearing before the Full Court and for Oral Argument thereon.

The plaintiff appellee respectfully petitions:

1. For a rehearing of this case.

2. For an oral argument on the petition for rehearing before the full Bench of this Court.

This petition is based on the following grounds:

1. The record in this Court shows that the plaintiff appellee was needlessly denied an adequate opportunity to brief and argue his case. It shows that a joint stipulation of both sides to extend the time for his brief and to reset the oral argument, based upon the absence of his sole counsel on a case in the United States District Court for the District of Puerto Rico was denied by this Court on an order shortly preceding the expiration date for his brief and due to an accidental mistake in the Clerk's office the notice of this order did not reach his counsel until after the expiration date for the brief and until the argument was almost at hand. This made it necessary for his counsel to make an emergency return trip to his office where he arrived twenty-four hours before the scheduled argument, with his brief in default, and with only twenty-four hours to prepare the brief and prepare the argument in this case wherein this Court took thirteen pages to write an opinion on the facts and law. Within that twenty-four hours, by working with the printer nearly all of the night preceding the argument, his counsel prepared a short brief, the best that could be done in that time, but which the opinion at the bottom of page 6 characterizes as "extremely abbreviated" as to the evidence without explaining the cause. With practically no sleep and no adequate opportunity to prepare his oral argument his counsel was obliged to argue this case. The foregoing facts appear from the stipulation, the order denying same, and the petition for leave to file appellee's brief. And the facts stated in this paragraph are further verified in this petition.

2. Plaintiff appellee respectfully urges that the foregoing state of facts on the face of this record constitute a miscarriage of justice, an abuse of discretion by the Court, and a denial of adequate opportunity for him to present the facts, which if adequately presented might have avoided the factual and legal errors in the opinion, to wit:

3. The opinion ignores important evidence of the plaintiff appellee sufficient to sustain the verdict, to wit: positive testimony by plaintiff himself and his witnesses to the effect that the defendant's employees were working beneath this scaffold during the hour in question, between 8:00 and 9:00 A.M., that it was easily possible for one person to move the end of the saw-horse in question, plus the admission of several of defendant's employees that the bins in the vicinity of this end of the saw-horse contained special orders for customers. It is presently impossible to cite the record on this evidence and other factual matters in this petition because the same is being prepared under difficult and emergency conditions in San Juan, Puerto Rico, in the middle of an important trial, being the same one mentioned in the stipulation denied by this Court.

4. The opinion further invades the province of the jury by drawing the Court's own inferences from facts and circumstances, whereas the jury had the right to draw contrary inferences.

5. The opinion at the bottom of page 10 proceeds on the erroneous implied legal premise that there must be "direct proof" of negligence, contrary to the governing Indiana cases cited in plaintiff's brief.

6. The opinion at the top of page 11 practically admits that the collapse occurred because someone moved the west end of the saw-horse, after which the opinion argues that there was no circumstantial evidence from which the jury could infer that an employee of defendant moved it. The opinion does this by ignoring the aforesaid evidence that many of defendant's employees were working in that room during the hour in question, plus a totally unjustified argument of the Court's inference that it was impossible for a man to move the leg, whereas one or more witnesses on plaintiff's side testified directly to the contrary, that one man could make the movement easily, and the physical facts concerning the scaffold ignored in the opinion so indicate also.

7. Although there was no "direct" testimony of an eye-witness who saw defendant's employee do the act, there was abundant circumstantial evidence from which the jury could so infer. The opinion not only errs in fact, but constitutes a serious violation of the plaintiff's right to a jury trial and it impairs his constitutional right in that regard.

Wherefore, the plaintiff appellee respectfully prays:

1. A rehearing of this cause.

2. An oral argument on this petition before the full Bench of this Court.

Jay E. Darlington
Attorney for Plaintiff Appellee

Affidavit No. 30
Commonwealth of Puerto Rico,
Municipality of San Juan—ss.

Jay E. Darlington, being first duly sworn, says that the factual allegations in paragraph 1 of this petition are true.

He further says that he mailed a true copy of this petition to counsel for the defendant appellant, Mr. Glenn D. Peters, Hammond, Indiana, on 27 February 1955, by Air Mail Special Delivery, simultaneously with mailing the petition in the same manner to the Clerk.

Subscribed and sworn to before me by Jay E. Darlington, of legal age, married, and temporarily resident in San Juan, Puerto Rico, whom I personally know, in San Juan, Puerto Rico.

27 February 1955.
(Seal)

/s/ *Maxine Mirus Auld*
Maxine Mirus Auld
Notary Public

And afterwards, to-wit, on the eighth day of March, 1955, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
No. 11215

Order.

(Entered March 18, 1955)

It is ordered by the Court that the petition for a rehearing of this cause before the full Court be, and the same is hereby, denied.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of the papers filed and proceedings had, made in accordance with the Designation of Record filed on May 16, 1955, In

Cause No. 11215

Roy Sickles, Plaintiff-Appellee,

vs.

Graybar Electric Company, Defendant-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of May A. D. 1955.

Kenneth J. Carrick
Clerk of the United States Court of Appeals
For the Seventh Circuit.

(Seal)

JUN 29 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 195....

No. 127

ROY SICKLES,
Plaintiff-Petitioner,

VS.

GRAYBAR ELECTRIC COMPANY,
Defendant-Respondent.

DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

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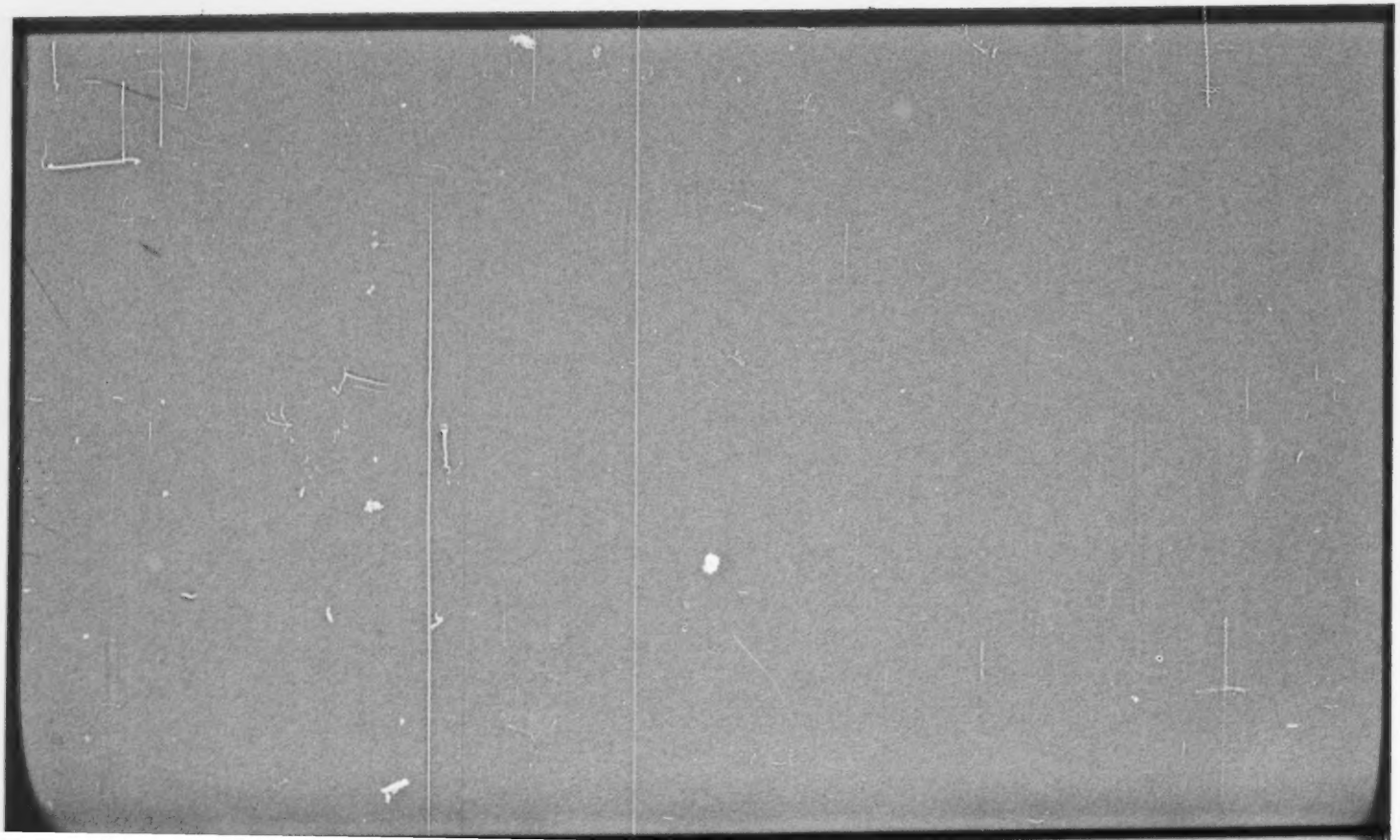

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No right of the petitioner under the Seventh Amendment was infringed. Failure of proof of the negligent act in a cause bottomed on negligence requires a finding of non liability as a matter of law. 2-3-4

Res ipsa loquitur is not applicable notwithstanding petitioner's disguise. 4

The Court below did not deprive petitioner of any opportunity to present his cause. 5

a. No showing of any harm to petitioner. 6

b. No showing of effort to clear the way. 6

c. Ample opportunity existed. 6

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Context must be read. 5

No importance of cause here shown. 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 195....

No. 127

ROY SICKLES,
Plaintiff-Petitioner,

VS.

GRAYBAR ELECTRIC COMPANY,
Defendant-Respondent.

DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Seventh Circuit.

This respondent after wading through this 52 page petition for certiorari (118 pages including appendix) concludes petitioner is seeking this writ upon three propositions.

1. That the opinion of the Court of Appeals violated plaintiff's rights under the Seventh Amendment.

2. That the Court of Appeals failed to evaluate the circumstances appearing in this record and consequently erred in its decision.

3. That the Court of Appeals abused its discretion in refusing petitioner a further and second extension of

time within which to file his *(appellee's)* brief in the Court of Appeals.

No one of these propositions is here supported.

1. *There is no showing that petitioner's rights under the Seventh Amendment were infringed. He was not deprived of trial by jury as granted to him by such amendment.*

Where, as in this record, ultimate facts necessary to sustain a verdict are absent, *the defendant* under the *Seventh Amendment* is *entitled* to a directed verdict. *Both sides of a controversy are protected by such Amendment.*

Rules 50 *and* 56, *Federal Rules of Civil Procedure*
Moore Adm. v. *Chesapeake & Ohio Railway Co.*
(1950) 340-US-573 (95 Led 547) p. 576

Pennsylvania RR Co. v. *Chamberline*
(1933) 288-US-333 (77 Led 819) p. 340, 341

Baltimore & C Line v. *Redman*
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Galloway v. *United States*
(1943) 319-US-372 (87 Led 1458) p. 386, 389, 390, 396, 406, 407

Petitioner's summary of the evidence found in pages 12 *through* 31 *of the Petition is marked by inaccuracies and misstatements of the record* and omits uncontradicted direct evidence which completely destroys plaintiff's case and makes the verdict below *clearly contrary to law.*

A. Plaintiff was required to show that if defendant's employees committed the claimed acts causing his injuries that such acts were committed between 8:30 a.m. and 9:00 a.m. of the morning of the accident. (The evidence is here undisputed that the scaffolding occupied the position where plaintiff and his employees placed it at 8:30 a.m. the morning of the accident, and that the scaffolding collapsed at 9:00 a.m. of said morning.)

B. It appears without contradiction that *no employee of the defendant was at or near the leg of the horse of the scaffolding claimed to have been moved by them during this period.* (R. 97 - 101.) Consequently there is a complete failure of proof of the claimed negligence and the casual relationship. The following claims (among others) by petitioner are unsupported.

The argumentative statement of facts that the scaffolding was of such light-weight that it could easily have been moved by one man does not here appear. It contained over fifty cubic feet of fir lumber, whether it was light strong fir or otherwise does not appear. The scaffolding was moved the Saturday before the accident and after the accident, *but one piece at a time and not as a unit.* No evidence as to the character of the floor does here appear. There is no evidence indicating that the scaffolding as it stood at 8:30 a.m. in the morning of the accident was so standing as to prevent access to any bin. There is no evidence of any necessity or occasion for the movement of any trucks in and around the area next to the collapsing horse in the critical period. There is no evidence to the effect that defendant's employees were present during such time notwithstanding one of plaintiff's employees was in the area all of the time. (Plaintiff's statement to the contrary notwithstanding.)

Whether or not the room in which this work was being done was or was not the cross-roads of defendant's activities, is immaterial, because the uncontradicted evidence shows *that these cross-roads were not being used during this critical period as plaintiff claims. There is no direct evidence nor any inference which can be drawn from direct evidence that contradicts defendant's employees denial of moving the scaffold.*

We have here a verdict which cannot be sustained either by inferences or otnerwise. The essential elements of plaintiff's case to the effect that defendant's employees moved the scaffolding is not here, consequently the inference of negligence and causation so essential is completely absent. If it be assumed the leg of the scaffolding was moved thus causing it to collapse, such moving (under this record) cannot be found to be the act of defendant's employees. *None of them was at a position necessary to move it.* Every inference from proven facts obviously involves some speculation but when an inference is drawn *contrary to the proven facts* such speculation is condemned by the law. The citizen's property is and should be protected from a confiscatory verdict, based on an unwarranted guess. Such is trial by jury under the Seventh Amendment.

The whole foundation upon which petitioner seeks a review of this case is *res ipsa loquitur,* which obviously is not applicable and which petitioner concedes.

There is nothing here to show whether the scaffold collapsed and then moved, or collapsed because of its use by the petitioner or otherwise. *The only persons appearing in this record to have had any contact with this scaffolding at anytime during the morning of the accident were the petitioner and his employees* and they are silent as to their moving it.

The condition of the scaffolding after the accident although one of plaintiff's employees repaired and assembled it piece by piece is not described. Whether the legs spread apart or not it does not appear (notwithstanding petitioner's statement to the contrary).

2. *The Court of Appeals stated the record accurately.*

Petitioner cites isolated sentences without the context. A particularly glaring instance of failure to read context is found in the assertions on page 8 of the Petition.

3. *The court below committed no error nor did it abuse its discretion in failing to give appellee additional time.*

Petitioner has not shown:

a. Why he did not have sufficient time to prepare an *appellee's brief.* This action was instituted February 14, 1950. On April 4, 1950, defendant filed its answer putting the cause at issue. On March 26, 1953, the cause was submitted to a jury which returned its verdict on April 1, 1953. At the close of plaintiff's evidence and also at the close of all the evidence, defendant moved for a directed verdict urging that the evidence and the inferences therefrom were completely insufficient to support a verdict for the plaintiff and thus defendant would be and was entitled to a verdict. On April 8, 1953, defendant served and filed its motion for a judgment *non obstante,* setting up the same grounds as were set up in the motions for directed verdict. On April 20, 1954, the court below denied defendant's motion. On November 3, 1954, the printed record in this cause was filed, appeal theretofore having been properly instituted.

On November 20, 1954, appellant (respondent here) filed its brief. The petitioner-appellee sought and obtained an extension until *January* 17, 1955, (nearly 90 days) to file his brief. He then sought a further extension. This extension was denied by the Court of Appeals, but, however, such Court *permitted* the filing of *appellee*-petitioner's brief on January 18, 1955, and nothing is here shown wherein it failed to present petitioners case.

This cause has been pending since February 14, 1950. It was instituted by the plaintiff, presumably upon a then evaluation of the facts. The position of the defendant has been clear ever since the cause was at issue. Plaintiff has had ample time (since at least November of 1954) to examine the position of the defendant and to attempt to answer it. A transcript of this record has been available from April, 1954.

b. There was no showing to the Court of Appeals why the activities in a State Court and in a District Court of the United States were so time consuming, that from April, 1954, until January, 1955, petitioner's counsel had been unable to prepare an appellee's brief or to learn the nature of his record in order to answer appellant's brief.

Nor was there here or there any showing that from the time defendant appellant served its brief upon plaintiff, petitioner appellee, November, 1954, why the activities of plaintiff's counsel prevented his putting on paper what he should have already known. There is much unaccounted for time during this long period. There is no showing of the slightest effort to obtain relief from either the State Court or the United States Court in Puerto Rico. *The Court below did permit the filing of an appellee's brief.*

c. There is no showing here, that appellee petitioner was not able to present there all he thought pertinent. An examination of this petition and petitioner appellee's brief below and petitioner appellee's petition for rehearing below shows that appellee's brief below presented all that here appears.

Appellant respondent's statement of facts in its brief below was not specifically challenged. It was the *appellant's* obligation in the Court of Appeals to recite the record

accurately. If it so failed appellee's problem was only to point out such failure, (See Rule 16, USCA Seventh Circuit), this litigation was appellee petitioner's case from its inception.

d. The Court of Appeals states that the presentation of appellee's facts is argumentative. The explanation of this is clear, petitioner-appellee's presentation of the record here is equally so.

There is no evidence here to support this verdict and no amount of time, nor of patience, nor of research can supply its absence. *Knickerbocker Printing* v. *United States* .....US..... (99 Led) (Advance p. 19) is pertinent here.

Just what importance this case has to justify this court taking it over does not appear from this Petition. The authorities cited by petitioner each demonstrate only that a jury be permitted to infer negligence or custom or cause from proof either direct or by logical inference of the presence of an *agent or instrumentality at a position likely to or actually causing the wrong.* Their inapplicability to the present controversy is obvious.

No reason here appears why the writ prayed for should be granted. The petition of the plaintiff should be denied.

Respectfully submitted,
ALFRED H. HIGHLAND,
GLENN D. PETERS,
G. EDWARD MCHIE,
Attorneys for
Defendant-Respondent.

NOV 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 127

ROY SICKLES,
Plaintiff-Petitioner,

vs.

GRAYBAR ELECTRIC COMPANY,
Defendant-Respondent.

PETITION FOR REVIEW OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for Seventh Circuit.

JAY E. DARLINGTON,
306 Hammond Building
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Attorney for Plaintiff-Petitioner.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL., LA KEVIEW 5-6581

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PETITION FOR REVIEW OF PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for Seventh Circuit.

Petitioner respectfully requests a rehearing of this Court's order of October 10, 1955 denying his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit which reversed a $40,000.00 personal injury judgment and verdict awarded him in the District Court (N. D. Ind.). *Sickles* v. *Graybar Electric Co.*, (7 Cir. 1955), 219 F. 2d 847 (opinion by Hon. J. Ear' Major).

The petition for certiorari sought review on the grounds that petitioner's *individual* rights had been violated by

the Court of Appeals' opinion striking down the verdict for alleged insufficiency of evidence (pp. 37-48) and by the Court of Appeals' abuse of discretion in procedural matters in that court. (pp. 49-52).

Grounds for Rehearing.

Apart from the protection of his individual rights, petitioner now asks this Court to review this case on grounds of **public policy**, namely:

(1)

The opinion below should not be allowed to stand as a precedent.

It is bad not merely because it invades the jury's province on the factual point decided at the end of the opinion. (petition, pp. 39-40, 120-123. 219 F. 2d at pp. 854-855).

It is worse as a precedent because of the manner in which the opinion glosses over this error and discourages review of it by burying it under the preceding ten pages of confused factual argument on points immaterial to the one decided. (Petition, pp. 37-38, 109-120. 219 F. 2d at pp. 848-853)

(2)

Increased Congressional interest in physical encroachments on the functioning of juries by "bugging" jury rooms with microphones, and the resulting public concern over preserving the jury system inviolate, makes it appropriate and desirable for this Court to scrutinize and stop the more dangerous and subtle judicial encroachments on the jury system by opinions like this one where Courts of Appeals substitute their inferences of fact in place of the juries.

ARGUMENT.

For purpose of review in the Court of Appeals or in this Court, the fact situation was much more simple than the long and often inaccurate discussion in the opinion implies:

Plaintiff-petitioner, a carpenter was standing on a platform of horizontal planks which were held up by several wooden legs shaped like large saw-horses. Somebody moved one end of one saw-horse by sliding it along the floor about 18 inches. This deprived the leg of its former support and caused it to collapse, throwing plaintiff to the floor and injuring him.

The opinion starts out with a statement (almost an overstatement) of reluctance to reverse for insufficient evidence. (petition, 109. 219 F. 2d at p. 848).

The first ten pages of the opinion read as if the Court is getting ready to decide there was no evidence that the leg was moved or that the movement was the proximate cause. Included in this, the opinion erroneously states that the plaintiff bases his case on the doctrine of *res ipsa loquitur*. This part of the opinion is confused and shifting, with a definite undertone of hostility to the verdict, as if to belittle it on as many grounds as possible. (petition pp. 109-121. 219 F. 2d at pp. 848-853).

Then, after these ten pages of confusion of fact and law, the opinion admits (with expressed reluctance) that there was sufficient evidence for the jury to find that the negligent act of moving the scaffold leg was done and that it was the proximate cause of plaintiff's fall. (petition p. 120. 219 F. 2d at p. 854, top).

Then, the opinion devotes its remaining three pages to holding that there was no circumstantial evidence from which the jury could infer that the negligent moving of the leg was done by any of defendant's employees.

Factually, this part of the opinion is such an arbitrary invasion of the jury's province, that if it stands, any Court of Appeals can reverse any plaintiff's verdict which it does not like, whenever any essential fact is his case rests upon physical circumstantial evidence. (petition, pp. 39-43, 120).

This opinion adopts the peculiar method of judicial "nagging" at the verdict, belittling the verdict and the plaintiff's case on a number of points where it is admittedly sufficient, seemingly to soften it up for the final assault and to conceal the unsoundness of the ground on which reversal is made. This also tends to discourage review by certiorari, because, until scrutinized, the opinion has the superficial appearance of "just another involved fact case."

> "Nevertheless, *this court* in *a very special sense* is charged with the duty of construing and upholding the constitution; • • •
>
> • • •
>
> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Compare *Patton* v. *United States*, 281 U.S. 276, 312, 50 S. Ct. 253, 74 L. Ed. 854, 70 A.L.R. 263." (Our emphasis).
>
> *Dimick* v. *Schiedt* (1935) 55 S. Ct. 296, 300-301.

Wherefore, the petitioner-plaintiff prays that this Court may reconsider its order denying his petition for certiorari, and that the latter may be granted.

Respectfully submitted,

JAY E. DARLINGTON,
Attorney for Plaintiff-Petitioner.

Certificate of Counsel.

I certify that the foregoing petition is presented in good faith and not for delay.

I further certify that to my best judgment and belief, this petition is restricted to the grounds specified in Rule 58, par. 2, namely:

Ground 1, the public policy need for correcting the opinion below as a precedent, was only mentioned in the Petition for Certiorari (p. 39) and the petition was pointed to the protection of the petitioner's individual rights. Hence, I consider ground 1 as being "a substantial ground available to petitioner although not previously presented", quite as much as the point raised in the case cited in Rule 58, par. 2, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50.

The events mentioned in Ground 2 have happened since the Petition for Certiorari was filed. While in no way controlling this Court, their unusual character seems to me to make them "intervening circumstances of substantial effect" under Rule 58, par. 2.

JAY E. DARLINGTON,
Attorney for Plaintiff-Petitioner.